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*Together with:
Higgins et al v. Oklahoma City

No.336

CLERK'S COPY

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1935.

No. 335

GEORGE NOBLE AND WILLIAM NOBLE,
PETITIONERS,

vs.

THE CITY OF OKLAHOMA CITY, A MUNICIPAL CORPORATION

No. 336

ROBERT W. HIGGINS ET AL., PETITIONERS,

vs.

THE CITY OF OKLAHOMA CITY, A MUNICIPAL CORPORATION

ON WRITS OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OKLAHOMA

PETITION FOR CERTIORARI FILED AUGUST 5, 1935.

CERTIORARI GRANTED OCTOBER 14, 1935.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935

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(Note: The record of the trial of a case as prepared in and transmitted from the trial court to the Supreme Court of the State of Oklahoma on appeal is termed a "Case-Made" and is referred to in the briefs and proceedings in the Supreme Court by the abbreviation "C-M." In the following printed transcript the reference C-M is to the original typewritten record of the trial and proceedings in the trial court as filed in the Supreme Court of the State of Oklahoma. Also in the statement of the evidence in said printed transcript the above case will be referred to as the Noble case and its companion case, with which it was consolidated in the Supreme Court of Oklahoma and is consolidated in the Supreme Court of the United States, as the Higgins case.)

[fol. 8] STATE OF OKLAHOMA,
Oklahoma County, ss:

IN THE DISTRICT COURT IN AND FOR THE SAID COUNTY AND STATE

No. 66,726

GEORGE NOBLE and WILLIAM NOBLE, Plaintiffs,

vs.

THE CITY OF OKLAHOMA CITY, a Municipal Corporation, Defendant

PETITION—Filed Jan. 6, 1931

Come now the plaintiffs above named and for their cause of action against the defendant above named allege and say:

1. That the defendant is now, and was at all times herein mentioned, a municipal corporation and city of the first class, created, organized and existing as such under the laws of the former territory, and now state, of Oklahoma, and possessing all the political, governmental, legislative and corporate powers granted and delegated a city of the first class under the laws of said territory and state.

2. That the plaintiffs are the owners in fee simple of the full title, both legal and equitable, and are entitled to the immediate possession of the following described real estate situated in Oklahoma County, in the State of Oklahoma, [fol. 9] and within the present corporate limits of said City of Oklahoma City, to-wit:

Forty (40) feet off the north end of Lot No. (6) Six, in Block No. Thirty-six (36), in the original townsite of said City of Oklahoma City, according to the recorded plat thereof, and a strip of land ten (10) feet wide across and adjoining the north end of said Lot Six (6), being one-half (½) of the alley twenty (20) feet wide extending east and west through said block as laid out and designated on said plat, where and as the said alley adjoins the north end of said Lot Six (6);

and that the defendant wrongfully detains the possession thereof from them.

3. That the plaintiffs deraign their title to the said real estate as follows:

By patent from the United States of America to Edgar N. Sweet, Levy E. Coe and David H. Hammons, as trustees of the townsite of said Oklahoma City, in trust for the several use and benefit of the occupants of said townsite according to their respective interests, a full, true and correct copy of which is hereto attached, marked Exhibit A, and made a part hereof.

By deed from said townsite trustees to Naoma Noble, conveying said lot No. Six (6), in Block No. Thirty-six (36), a full, true and correct copy of which is hereto attached, marked Exhibit B, and made a part hereof.

[fol. 10] By inheritance from Naoma Noble, who died in Oklahoma County, in the State of Oklahoma, prior to the year 1920, leaving surviving her the plaintiff George Noble, her husband, and the plaintiff William Noble, her son, as her sole and only heirs.

4. That on the 28th day of March, 1891, the said Naoma Noble and George Noble, her husband, made, executed and delivered to the Choctaw Coal and Railway Company, a railway corporation, their deed conveying said forty (40) feet off the north end of said Lot No. Six (6), for use and occupation by said grantee and its successors and assigns

of said tract of land conveyed by said deed for a right of way for the constructing, operation and maintenance of a railway, but with the condition subsequent stated in said deed that in case of the abandonment of the real estate conveyed therein for the purposes mentioned, the same should revert to the grantor, their heirs, or assigns, a full, true and correct copy of which deed is hereto attached, marked Exhibit C, and made a part hereof; that in April, 1891, the said City of Oklahoma City, by ordinance duly passed, adopted and enacted, vacated the alley twenty (20) feet wide extending east and west through said block No. thirty-six (36) as laid out and designated on the plat of the original townsite of said City of Oklahoma City, as a public way and granted the said Choctaw Coal and Railway Company a permit, franchise or right to use the same for railroad right of way and railroad purposes; that the real estate described in said deed and that included in said alley [fol. 11] was taken, used and occupied by said Choctaw Coal and Railway Company and by the Choctaw, Oklahoma and Gulf Railroad Company, a corporation, as its successor and assign, and by the Chicago, Rock Island and Pacific Railway Company, a corporation, as lessee of said Choctaw, Oklahoma and Gulf Railroad Company, from about the time of the execution of said deed to the 4th day of December, 1930; that on or about the 17th day of November, 1927, the said Choctaw Oklahoma and Gulf Railroad Company and the said Chicago, Rock Island and Pacific Railway Company entered into a contract whereby they agreed for a valuable consideration to convey to the defendant by a quit claim deed, all their right, title and interest in and to the real estate above described and other real estate and to discontinue the use and occupation of, vacate and abandon the same for right of way and railroad business and purposes; that, thereafter, said railroad companies made application to the Interstate Commerce Commission of the United States for a certificate of Public Convenience and Necessity granting them permission to abandon a portion of their line of railroad through the said City of Oklahoma City, described in their said application and including all the real estate above described, and such proceedings were had on said application that thereafter, and on the 9th day of April, 1928, the Certificate of Public Convenience and Necessity as applied for was by said Interstate Commerce Commission granted, a full, true and correct copy of which

is hereto attached, marked Exhibit D, and made a part [fol. 12] hereof; that on or about the 4th day of December, 1928, the said companies for a valuable consideration executed and delivered to the defendant an instrument of conveyance termed a quit claim deed, by which they conveyed all of their right, title and interest in and to all the real estate above described, together with other lands; that thereafter, and on the 4th day of December, 1930, the said railroad companies abandoned the use of said land for right of way and railroad purposes and ceased to use and occupy the same for any railroad purpose or for any purpose whatever, and took up and removed all railroad tracks therefrom, and delivered possession thereof to the defendant, and thereupon, the defendant entered into possession of said real estate, and ever since has retained, and still does retain, the possession thereof to the exclusion of the plaintiffs therefrom; and that the said defendant in purchasing said real estate from said railroad companies and in obtaining their quit-claim deed therefor, and in entering into possession thereof, did not intend, and does not now intend, to use the same for a railroad right of way, or for any railroad purpose whatever, and has not used, and is not using, and can not lawfully use, the same for any such purpose, but intends to enclose, appropriate, convert and apply the same so as to make it a part of a public park of said city, and for public use as such park, and now holds possession thereof for said purpose.

5. That by the terms and provisions of said deed, Exhibit C, when the said railroad companies discontinued the use [fol. 13] and occupation of the real estate therein described as and for a right of way for the operation and maintenance of their railroad and business thereon, and abandoned the same for such purpose, their title thereto was defeated and terminated and the title to said real estate reverted to the plaintiffs, who became entitled immediately to re-enter and take possession thereof for breach of the condition in said deeds and thereby became invested with the full fee simple title thereto and the possession thereof, free and discharged from all and whatever right and title the said railroad companies, or any of them, may at any time have had to the same, or to the use and occupation thereof for right of way and railroad purposes, or for any purpose; that the said quit claim deed purporting to convey whatever title the

said railroad companies had in the said real estate to the defendant is conclusive evidence of the abandonment of the real estate therein described for railroad purposes, but is ineffective in law to convey any right, title or interest therein, for that the said railroad companies had no right, title or interets therein which they could convey to the defendant, and the defendant did not, and could not, acquire any title, right, claim or interest in and to said real estate under and by virtue of said quit claim deed; that when the use and occupation of said alley for right of way and railroad purposes was abandoned by the said railroad companies, after having been vacated as a public way by the defendant as above set forth, then the same reverted to the [fol. 14] owners of real estate thereto adjacent in proportion to the frontage of such real estate, and the portion thereof measured by said lot extended to the middle of said alley reverted to the plaintiffs; and that the said deed from said railroad companies to the defendant constitutes a cloud on the title of the plaintiffs in and to said real estate which they are entitled to have cancelled and removed and to have the title thereto quieted in them against all claims of the defendant.

Wherefore, the plaintiffs pray that they have and recover of and from the defendant a judgment for the possession of the said real estate first described herein and the ejectment of the defendant therefrom, and a further judgment quieting title thereto in them against the defendant and cancelling and removing the said quit claim deed from said railroad companies to the defendant as a cloud on their title thereto, and a further judgment adjudging them to be the owners of the said real estate in fee simple absolute, and free and clear of any and all claims of the defendant whatsoever, and perpetually enjoining and restraining the defendant from ever asserting any claim of right or title thereto, or interest therein, and that they have all such further or other and different relief in the premises as shall be lawful, equitable and just.

Henry L. Goddard, Fred Ptak, and Chas. H. Garnett,
Attorneys for Plaintiff.

[fol. 15] EXHIBIT "A" TO PETITION

Benjamin Harrison to Edgar N. Sweet, David H. Hammons, Levy E. Coe, Trustees

United States of America, to all whom these presents shall come, Greeting:

Certificate No. 2

Whereas Edgar N. Sweet, Levy E. Coe and David H. Hammons, Trustees of the townsite of Oklahoma City in the second county in Oklahoma Territory in trust for the several use and benefit of the occupants of the townsite of Oklahoma City in said County and Territory according to their respective interests have deposited in The General Land Office of the United States a Certificate of the register of The Land Office at Oklahoma City, Oklahoma Territory Whereby it appears that full payment has been made by the said Edgar N. Sweet, Levy E. Coe and David H. Hammons, Trustees as aforesaid in Trust as aforesaid according to the provisions of the Act of Congress of the 24th of April, 1820 entitled "An Act making further provisions for the sale of Public Lands" and the Acts supplemental thereto including the Act of May 14th, 1890, for the South East Quarter of Section Thirty Three in township twelve north of Range Three West of Main Meridian in Oklahoma Territory containing One Hundred and Sixty Acres according to the Official Plat of the Survey of the said Lands returned to the General Land Office by the Surveyor General [fol. 16] which said Tract has been purchased by the said Edgar N. Sweet, Levy E. Coe and David H. Hammons, Trustees as aforesaid.

Now Know Ye that the United States of America in consideration of the premises and in conformity with the several Acts of Congress in such cases made and provided Have Given and Granted and by these presents do give and grant unto the said Edgar N. Sweet, Levy E. Coe and David H. Hammons, Trustees as aforesaid in Trust as aforesaid and to their successors the said tract above described to have and to hold the same together with all the rights, privileges, immunities and appurtenances of whatever nature thereunto belonging unto the said Edgar N. Sweet, Levy E. Coe and David H. Hammons, Trustees as aforesaid in Trust

as aforesaid and to their successors and assigns in Trust as aforesaid.

In Testimony Whereof, I, Benjamin Harrison, President of the United States of America have caused these letters to be made Patent and the seal of the General Land Office to be hereunto affixed.

Given under my hand at the City of Washington the first day of October in the year of our Lord One Thousand Eight Hundred and Ninety and the independence of the United States the one hundred and fifteenth.

By the President, Benjamin Harrison. (Seal.)

[fol. 17] By M. McKean, Secretary, J. W. Townsend, Recorder of the General Land Office. Recorded vol. 9, Pages 383 to 384.

TERRITORY OF OKLAHOMA,
Oklahoma County, ss:

This instrument filed for Record on this 10th day of October A. D. 1890 and duly recorded in Book 1, page 58 of Miscellaneous Records.

John M. Martin, County Clerk.

EXHIBIT "B" TO PETITION

Edgar N. Sweet, Frank S. Fay, and David H. Hammons, as Trustees, to Naomá Noble

This indenture made this Twenty-seventh day of December in the year of our Lord One Thousand Eight Hundred and ninety, by and between Edgar N. Sweet, Frank S. Fay (Successor to Levy E. Coe) and David H. Hammons, as trustees for the townsite of Oklahoma City, in the Territory of Oklahoma, parties of the first part, and Naoma Noble, of Oklahoma City, in the County of Oklahoma, and Territory of Oklahoma, party of the second part, Witnesseth:

Whereas, said parties of the first part have been appointed trustees for said townsite by the Secretary of the Interior, under the provision of the Act of Congress approved May 14, 1890, entitled, "An Act to provide for

townsite entries of lands in what is known as 'Oklahoma' and for other purposes,"

[fol. 18] Whereas, pursuant to said appointment as such trustees, said parties of the first part have duly qualified and entered upon the performance of their duties as such, as provided in said act and the regulations of the Secretary of the Interior for their guidance, and

Whereas, on the third day of September, A. D., 1890, said parties of the first part, as such trustees, entered the Southeast Quarter of Section thirty-three, Township twelve North of Range three West, in said Territory, upon which said townsite is situate, in trust for the several use and benefit of the occupants thereof, according to their respective interests, and have made survey thereof into lots, blocks, squares, streets and alleys, and have assessed upon each of the lots on said townsite the sums of money contemplated by the provisions of said act, and

Whereas, said trustees find that according to the true spirit and intent of said act that said party of the second part is interested in said townsite and entitled to the premises therein as hereinafter described, and

Whereas, said party of the second part has paid the assessments upon said property amounting to the sum of Three and 75/100 Dollars;

Now, Therefore, said parties of the first part, as such Trustees, by virtue of the power vested in and conferred upon them by the terms of said Act, and in consideration of said sum, the receipt of which is hereby acknowledged, by these presents do grant, convey and confirm unto the [fol. 19] said party of the second part, and her heirs and assigns, all the following lot, piece and parcel of land situate in the town of Oklahoma City, County of Oklahoma, and Territory of Oklahoma, described as follows: to wit:

Lot No. Six (6) in Block No. Thirty-six (36) as same appears from the original plat and survey of said city as approved by said Board and now on file under the provisions of said Act of Congress,

To have and to hold the same, together with all and singular, the tenements, hereditaments and appurtenances thereunto belonging, or in anywise appertaining, forever:

In Witness Whereof, said parties of the first part, as

such trustees, have hereunto set their hands and seals, on the day and year first above written.

Edgar N. Sweet (Seal), Frank S. Fay (Seal), David H. Hammons (Seal), Trustees for the Townsite of Oklahoma City, Okla., Territory.

In Presence of: Ralph Guthrie.

TERRITORY OF OKLA.,
Oklahoma County, ss:

Be it remembered, That on this Twenty-Seventh day of December, A. D., 1890, before me, a County Clerk, came Edgar N. Sweet, Frank S. Fay and David H. Hammons, to me personally known to be the trustees of said townsite of Oklahoma City, and the identical persons described in, and [fol. 20] whose names are affixed to the foregoing conveyance, as grantors, and they severally acknowledged the execution of the same to be their voluntary act and deed, as such trustees, for the uses and purposes mentioned.

In testimony whereof, I have hereunto subscribed my name and affixed my official seal, on the day and year first above written.

John M. Martin (Seal), County Clerk.

Endorsed on back as follows: Territory of Oklahoma, Oklahoma County, ss. I hereby certify this instrument was filed for record in my office at 11:15 o'clock, A. M., January 21, 1891.

John M. Martin, County Clerk.

Recorded in Book 2 at page 519.

[fol. 21] EXHIBIT "C" TO PETITION

Mrs. Naoma Noble and George Noble, Her Husband, to The Choctaw Coal and Railway Co.

This deed made this 28th day of March in the year of our Lord One Thousand Eight Hundred and Ninety One Between Mrs. Naoma Noble and George Noble, her husband, parties of the first part and the Choctaw Coal and Railway Company, a Railway Corporation, party of the second part.

Witnesseth, that the said parties of the first part for and in consideration of the sum of One Dollar to them in hand paid by the said party of the second part, the receipt whereof is hereby confessed and acknowledged, do by these presents Remise, Release, and Quit Claim unto the said party of the second part and to its successors and assigns all their right, title, interest, claim and demand in and to the following described tract, piece and parcel of land situated, lying and being in the County of Oklahoma, Territory of Oklahoma, namely

Forty feet off the North end of Lot No. 6, in Block 36, in the City of Oklahoma and County aforesaid, Being intended for the use and occupation of said party, its successors and assigns, as and for its right-of-way for the constructing, operation and maintenance of its railroad and business at or upon the land hereby released and quit claimed: Provided, that in case of abandonment of said premises by said second party, its successors or assigns [fol. 22] for the purposes above mentioned, the same shall revert to the grantors, their heirs or assigns.

Together with all and singular the tenements, hereditaments and appurtenances thereunto belonging or in anywise appertaining.

To Have and To Hold the same to the party of the second part and to its successors and assigns to the sole and proper use, benefit and behoof of the said party of the second part, its successors and assigns forever, for the uses and purposes herein before set forth.

In Witness Whereof, the said parties of the first part have hereunto set their hands and seals the day and year first above written.

Executed in the presence of A. A. Barnes.

Naoma (her X mark) Noble (Seal), George Noble (Seal).

TERRITORY OF OKLAHOMA,
Oklahoma County, ss:

Be it remembered that on this 28 day of March A. D. Eighteen Hundred and Ninety-one Before me, the undersigned, a notary public for the County and Territory aforesaid, came Naoma Noble and George Noble who are personally known to me to be the same persons who executed

the foregoing instrument of writing and duly acknowledged the execution of the same.

In witness whereof I have hereunto set my hand and [fol. 23] affixed my official seal the day and year above written.

James Shear, Notary Public, Oklahoma County, Okla. Terr'y. (Seal.)

My Com. Ex. 17 day of Feb. 1895.

TERRITORY OF OKLAHOMA,
Oklahoma County, ss:

This instrument filed for record this 29 day of March A. D., 1895, at 5 P. M.

G. A. Beidler, Reg. of Deeds.

EXHIBIT "D" TO PETITION

Certificate of Public Convenience and Necessity

At a General Session of the Interstate Commerce Commission, Held at its Office in Washington, D. C., on the 9th day of April, A. D. 1928

Finance Docket No. 6665

Abandonment and Construction by Chicago, Rock Island & Pacific Ry. Co. et al.

Investigation of the matters and things involved in this proceeding having been had, and the commission having, [fol. 24] on the date hereof, made and filed a report on further hearing, containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof:

It is hereby certified, That the present and future public convenience and necessity (a) permit an abandonment by the Choctaw, Oklahoma & Gulf Railroad Company and the Chicago, Rock Island & Pacific Railway Company of the line of railroad in Oklahoma County, Okla., described in the application; and (b) require the construction by said Choctaw, Oklahoma & Gulf Railroad Company and the

Chicago, Rock Island & Pacific Railway Company of a new Passenger station in Oklahoma City, Okla., and the line of railroad in Oklahoma County, Okla., described in the application and report aforesaid.

[File endorsement omitted.]

Upon the filing of the foregoing petition summons was duly issued out of said court and was served on the defendant and returned into said court in manner and form as provided by law (C-M. 19-23).

[fol. 25] In the District Court of Oklahoma County

[Title omitted]

Answer and Cross Petition—Filed March 4, 1931

Comes now the defendant, the City of Oklahoma City, and for answer says:

I

That it denies each and every material allegation contained in plaintiff's petition not hereinafter specifically admitted.

II

And for further answer defendant says:

[fol. 26] That it admits that it is a duly organized municipal corporation and a city of the first class, under the laws of the state of Oklahoma, and possesses all the political, governmental, legislative and corporate powers delegated to a city of the first class as alleged in plaintiffs' petition.

2. That it denies that the plaintiffs are the owners in fee simple of the full title both legal and equitable in and to the land described in plaintiffs' petition and further specifically denies that the defendant wrongfully detains the possession of said land from plaintiff and that plaintiff is entitled to immediate possession thereof.

3. (a) Defendant admits that there was executed and delivered to Edgar N. Sweet, Levy E. Coe, and David H. Hammond, as Trustees of the townsite of said Oklahoma City, the patent described in plaintiffs' petition, a copy of which is set forth as Exhibit "A" thereto, but defendant alleges that long prior to the date of execution and delivery of said patent, the land involved in this suit and alleged to have been included in said patent, had been granted by Acts of Congress of the United States to the Choctaw Coal and Railway Company, a corporation, as a right of way and station grounds for a railroad line to be built by said railway company. That the terms and conditions of said grant, as contained in said Acts of Congress, had been fully accepted by the said Choctaw Coal and Railway Company prior to the date of execution and delivery of said patent, and were being fully complied with by said railway company with the approval of the Secretary of Interior [fol. 27] and the Congress of the United States, and that said land was not public lands of the United States subject to be conveyed to the grantees in said patent or to any other person but was long prior to time of the alleged conveyance the property of the said Choctaw Coal and Railway Company. That the General Land Office had no power or authority whatsoever to convey the land described in plaintiffs' petition or any part thereof to grantees therein named, and that said patent was wholly void and of no effect and conveyed no right, title or interest in and to the said land, and wholly failed to give any power or authority to the grantees in said patent or any of them to convey any right, title or interest in and to said land or any part thereof, as alleged in plaintiffs' petition.

That the Acts of Congress hereinbefore referred to are one taking effect February 18, 1888, Chapter 13, 25 U. S. Statutes at Large p. 35, and one taking effect February 13, 1889, Chap. 152, 25 U. S. Statutes at Large p. 668.

(b) Defendant has no knowledge as to whether or not the said townsite trustees executed and delivered to Naoma Noble the deed described and set forth as Exhibit "B" to plaintiffs' petition, and defendant, therefore, specifically denies that such deed was executed and delivered. But defendant avers that if such deed was executed and delivered, which is not admitted but it is hereby expressly denied, the

said Naoma Noble, by reason of the facts hereinbefore alleged, acquired no right, title or interest in and to said land [fol. 28] or any part thereof, by virtue of said deeds.

(c) Defendant has no knowledge as to whether or not Naoma Noble is deceased and that she left surviving her the plaintiff Geo. Noble, her husband, and William Noble, her son, as her sold surviving heirs and defendant, therefore, specifically denies that the said Naoma Noble is deceased and that the said plaintiffs were heirs as alleged in plaintiffs' petition.

4. (a) Defendant has no knowledge as to whether or not the said Naoma Noble made, executed and delivered to the Choctaw Coal and Railway Company the alleged deed described in paragraph four of plaintiffs' petition, copy of which is set forth as Exhibit "C" thereto, and defendant therefore specifically denies that such deed was executed and delivered. But defendant avers that if such deed was executed and delivered as alleged, which is not admitted, but is hereby expressly denied, the said Naoma Noble by reason of the facts aforesaid, had no right, title, interest, or estate to or in said lands at the time of the execution and delivery of said deed, and that said deed and conditions therein stated were wholly inaffective to give to plaintiffs or reserve in her or plaintiffs' favor any valid claim or title to a reversionary or any other interest in said land; and that plaintiffs have now no right, title or interest in or to said land or valid claim thereto.

(b) Defendant has no knowledge as to whether or not a portion of the land described in plaintiffs' petition was ever [fol. 29] shown by the townsite plat of said Oklahoma City as a part of a twenty foot alley of said City extending east and west through the City block as laid out and designated by said plat as a public highway, nor has defendant any knowledge as to whether or not in April, 1891, an ordinance was duly and legally passed and adopted vacating the alleged alley and attempting to grant said Choctaw Coal & Railway Company a permanent franchise and right to use said alley for a railroad right of way and for railroad purposes, as alleged in plaintiffs' petition, and therefore, defendant specifically denies that any part of said land ever legally constituted a part of a public alley of said

Oklahoma City and that such an ordinance as that described in plaintiffs' petition was regularly passed and adopted. But defendant alleges that if any part of said land was ever designated in any plat as a part of a public alley, which is not admitted, but is hereby expressly denied, the land being the property of the said Choctaw Coal & Railway Company was improperly and illegally platted as a public alley and that if the said City passed such an ordinance as that hereinbefore described, which is not admitted but is hereby expressly denied, it only gave the said railway company the right to use and occupy said alleged alley for railroad purposes and did not have the effect of releasing defendants' title to the said alley, if any it had, so that upon abandonment of said alley for railroad purposes the title thereto accrued to the abutting property owners.

[fol. 30] (c) Defendant admits that the property described in plaintiffs' petition including the alleged alley has been used and occupied by the Choctaw Coal and Railway Company and the Choctaw Oklahoma and Gulf Railroad Company, a corporation, as its successor and by the Chicago, Rock Island and Pacific Railway Company, a corporation, as lessee of said Choctaw Oklahoma and Gulf Railroad Company, continuously to the 4th day of December, 1930, when the said Choctaw Oklahoma & Gulf Railroad Company and the Chicago, Rock Island & Pacific Railway Company vacated said land. But defendant specifically denies that the date of possession of the Choctaw Coal and Railway Company began upon the date of the execution and delivery of the alleged deed from Naoma Noble to said railway company and avers that at the time the said townsite trustees obtained their said patent and the said plaintiffs obtained their said alleged deed from said trustees, and for a long time prior thereto, the said Choctaw Coal & Railway Company was the owner of said land as aforesaid and was constructing, if not operating its line of railroad thereon, and was occupying and using said land for railroad purposes, all of which was well known to the said grantees in said United States patent and to said Naoma Noble, and George Noble.

(d) Defendant admits that on or about the 17th day of November, 1927, the Choctaw, Oklahoma & Gulf Railroad

Company and the Chicago, Rock Island and Pacific Railway Company entered into a contract with defendant whereby they agreed for a valuable consideration to con-
[fol. 31] vey to the defendant by quit claim deed all their right, title and interest in and to the real estate described in plaintiffs' petition and to discontinue the use and occupation of said land and vacate and abandon the same for railway and right of way purposes as alleged in plaintiffs' petition, but defendant specifically denies that said deed was and is ineffective to convey title to the defendant.

(e) The defendant further admits that the said railroad companies made application to the Interstate Commerce Commission of the United States for a Certificate of Public Convenience and Necessity, granting them permission to abandon a portion of their line of railroad through said City of Oklahoma City; and defendant further admits that, acting upon said application, the Interstate Commerce Commission of the United States, did, on the 9th day of April, 1928, issue a certificate of Public Convenience and Necessity, granting permission of said railroad companies to vacate and abandon said right of way including the land described in plaintiffs' petition and that Exhibit "D" attached to said petition is a true and correct copy of said certificate.

(f) Defendant further admits that on the 4th day of December, 1928, the said Choctaw, Oklahoma & Gulf Railroad Company and the Chicago, Rock Island and Pacific Railway Company executed and delivered to the defendant an instrument of conveyance of the property involved in this suit, termed a quit claim deed, by which said railroad
[fol. 32] companies conveyed all their right, title and interest in and to the land involved in this suit, as alleged in plaintiffs' petition, but defendant specifically denies that said quit claim deed was and is ineffectual to convey title to said lands and defendant further admits that on the 4th day of December, 1930, the Railroad Companies abandoned the use of said land for right of way and railroad purposes and ceased to use and occupy the same and that said railroad companies took up and removed all railroad tracks therefrom and delivered possession of said land to the defendant as alleged in plaintiffs' petition.

(g) Defendant further admits that upon the abandon-

ment of said land by said railroad companies, as aforesaid, the defendant entered into possession of said land and has ever since retained and still does retain the possession thereof, to the exclusion of the plaintiffs, therefrom and defendant further admits that it is not now holding, occupying and using said land, nor does it intend to occupy, use and hold said land or any part thereof, for railroad right of way or for any railroad purposes whatever, but defendant avers that it now holds, uses and occupies the same and intends to hold, use and occupy the same as a public park of said City and for public use as such park, as alleged in plaintiffs' petition.

5. (a) Defendant admits that when the railroad companies discontinued the use and occupation of said land [fol. 33] as and for a right of way and for railroad purposes, their title thereto was defeated and terminated, upon a decree being entered in the United States District Court in and for the Western District of the State of Oklahoma, finding, holding and declaring that such railroad companies had so abandoned said property, and defendant specifically denies that upon such abandonment the full fee simple title to said real estate reverted to the plaintiffs, and that they became entitled immediately to re-enter and take possession of said land under the terms and provisions of said alleged deed, copy of which is attached to plaintiffs' petition, as Exhibit "C" and the defendant alleges that by reason of the facts hereinbefore stated, the said plaintiffs do not now have, nor have they ever had any right, title or interest in and to said property, nor have they ever had any lawful claim to or right of possession of said land or any part thereof. That the fee simple title to said land and the right of possession thereof belongs to defendant.

(b) Defendant further specifically denies that when the use and occupation of said alley for right of way and railroad purposes was abandoned by said railroad companies, it or any part thereof reverted to the plaintiffs. And defendant alleges that by reason of the Acts of Congress and the facts aforesaid, the plaintiffs did not acquire any right of reversion or any other interest in said alley or any other property described in their petition, upon the said land being abandoned for railroad purposes.

[fol. 34] That by express provisions of an Act of Congress which went into effect March 8, 1922, Chap. 94, 42 U. S. Stat. at Large 414, and the facts hereinbefore alleged, the said property described in plaintiffs' petition became the property of defendant upon a decree of the said United States District Court being entered, finding, holding and declaring that said property had been abandoned for railroad purposes and the defendant now owns said property and has the right of possession thereof.

III

For further answer the defendant says:

1. That Congress of the United States passed an Act which was approved on the 18th day of February, 1888, Chap. 13, 25 U. S. Statutes at Large, p. 35, granting the Choctaw Coal and Railway Company, a corporation, created under and by virtue of the laws of the State of Minnesota, a right of way through the Indian Territory, upon which to locate, construct, operate and maintain a railroad from a point on Red River (the southern boundary line of Indian Territory) at a bluff known as Rocky Cliff, in the Indian Territory and running thence by the most feasible and practicable route through the said Indian Territory, to a point on the East boundary line immediately contiguous to the West boundary line of Polk or Sevier Counties in the State of Arkansas; also a branch line of railway to be constructed from the most suitable point on said main line for obtaining a feasible and practicable route in a westerly or northwesterly direction to the leased coal veins of said [fol. 35] Choctaw Coal and Railway Company in Tobucksey, County, Choctaw Nation; with a right to construct, use and maintain such tracks, turnouts, branches and sidings and extensions as said company might deem it in their interest to costruct along and upon the right of way and depot grounds provided for in said Act.

2. That said corporation was authorized by said Act of Congress to take and use for all purposes of railway a right of way 100 feet in width through said Indian Territory for said main line and branch of the Choctaw Coal & Railway Company and to take and use a strip of land 200 feet in width with a length of 3000 feet, in addition to said right of way, for stations for every ten miles of said road,

with the right to use such additional grounds where there were heavy cuts or fills as may be necessary for the construction and maintenance of the road bed and extending 100 feet in width on each side of said right of way.

That a copy of said Act of Congress is hereto attached, marked Exhibit "A" and made a part hereof.

3. That subsequently Congress of the United States passed an Act which was approved February 13, 1889, Chap. 152, 25 U. S. Statutes at Large p. 668, amending the Act of February 18, 1888, aforesaid, and granting an extension of right of way to the said Choctaw Coal and Railway Company under the same terms and conditions as that granted under said Act approved February 18, 1888, as aforesaid, from the said leased coal veins of said Choctaw Coal & Railway Company in Tobucksey County, Choc- [fol. 36] taw Nation, in a Westerly or Northwesterly direction by the most feasible and practicable route to an intersection with the line of the Atchison, Topeka & Santa Fe Railway Company at the most convenient point between Halifax Station and Ear Creek, otherwise known as the North Canadian River, with the right to construct, use and maintain such tracks, turnouts, branches and sidings and extensions as said company might deem it in their interest to construct along and upon the right of way and depot grounds provided for in said Acts.

That a copy of said Act of Congress approved February 13, 1889, is herto attached, marked Exhibit "B" and made a part hereof.

4. That immediately after the taking effect of the said Act of Congress approved February 13, 1889, as aforesaid, the said Choctaw Coal and Railway Company, in compliance with the terms and provisions of said Acts of Congress selected and located the general route and line of its railway as in said Acts provided, and thereafter fully complied with all the terms and conditions thereof.

5. Defendant further alleges that the selection of said right of way by the said Choctaw Coal and Railway Company and the location and construction of said line of railroad upon said right of way and over and across the land described in plaintiffs' petition and sought to be recovered herein was fully approved in all things by the Secretary of the Interior of the United States and by Congress ex-

pressly and impliedly in various and divers Acts as will [fol. 37] more fully hereinafter appear.

6. That on the 21st day of February, 1891, an Act of Congress was approved by which the time was extended for the construction and completion of said Railway for a period of two years from the 18th day of February, 1892. That Congress thereafter passed an Act, which was approved January 22, 1894, extending the time for the completion of said railroad to February 18, 1896.

Copies of said Acts are hereto attached, marked Exhibits "C" and "D" and made a part hereof.

7. That in the year 1894, the said Choctaw Coal & Railway Company became insolvent and all of its property and franchises were on September 8, 1894, sold to Geo. H. Earl, Jr., Sidney F. Tyler, Frances I. Gowan, Geo. B. Kirkbride and Nicholas Thuron, by orders and judgments entered in the United States Court for Second Judicial Division of Indian Territory, sitting at McAlester, Indian Territory, and in the District Court of Oklahoma County, in an ancillary proceeding to the receivership proceeding in said court at McAlester, Indian Territory, and the District Court of Canadian County in an ancillary proceeding to that in the said United States Court at McAlester, Indian Territory. That said sale was not only made with the approval of the United States Court for said second Judicial Division of the Indian Territory and the other courts aforesaid, but with the approval of the Congress of the United States, said approval being given by Act approved August 24th, [fol. 38] 1894, wherein the above named purchasers of the property and franchises of the Choctaw Coal and Railway Company were granted specific authority to organize a corporation to take over said property and franchise of said Choctaw Coal and Railway Company; said Act of Congress being published as Chapter 330, 28 Statutes, at Large, p. 502, is hereto attached marked Exhibit "E," and made a part of this Answer.

8. That after the sale of all the property and franchises of said Choctaw Coal & Railway Company, as aforesaid, the said purchasers duly organized under the laws of the United States, the Choctaw, Oklahoma & Gulf Railroad Company, which succeeded to the absolute ownership of all the rights, property and franchises, including right of

way and station grounds belonging to the said Choctaw Coal and Railway Company, and that the Congress of the United States passed an Act which was approved April 24th, 1896, recognizing the said Choctaw Oklahoma & Gulf Railroad Company as the purchasers of and successors to all the said property franchises and rights of the said Choctaw Coal and Railway Company, and especially finding, ascertaining and declaring that the said Choctaw, Oklahoma & Gulf Railroad Company and its predecessor in interest, to-wit: the Choctaw Coal & Railway Company had fully complied with all Congressional Acts and requirements as to the selection of right of way and station grounds, the location and construction of said railroad over the lands of the various Indian tribes and the lands [fol. 39] belonging to the United States, including that described in plaintiffs' petition. That said Act of Congress comprises Chapter 122, 29 U. S. Statutes at Large, p. 98, a copy of said statute is hereto attached and marked Exhibit "F" and made a part of this Answer.

9. That at the time of the passage and approval of the said Acts of Congress approved February 18, 1888, and February 13, 1889, the land which is now embraced in Oklahoma City including the land described in plaintiffs' petition, belonged to the Creek Nation of Indians and the United States. That said Creek Indians obtained said land by Treaty with the United States, bearing date February 14, 1833. That in the year 1866, the said Creek Nation of Indians by Treaty dated June 14, 1866, conveyed said lands to the United States for the purpose of locating other civilized tribes of Indians thereon.

10. That by Treaty dated January 19, 1889, the Creek Tribe of Indians completely relinquished all claims to this western land, including all the land in what is now Oklahoma City, North of the North Canadian River.

11. That by reason of these treaties and relinquishments aforesaid, the title of the United States to this Creek Indian land became absolute on the 19th day of January, 1889, save and except the title to the right of way and station grounds previously expressly granted to the Choctaw Coal and Railway Company as aforesaid, and certain other tracts of land and reservations, not involved in this suit.

[fol. 40] 12. That the land sought to be recovered by plaintiff in this suit was never open to settlement as a part of the public lands of the United States. That the Congress in said Act, approved March 2, 1889, which provided for the opening of the Country, including that in and around Oklahoma City specifically reserved all rights of way previously granted by it to railroad companies. That thereafter, towit: on the 23rd day of March, 1889, Benjamin Harrison, President of the United States, in his Proclamation opening the Country in and around Oklahoma City for settlement at 12:00 o'clock noon, April 22nd, 1889, expressly set forth in said Proclamation that the Country was opened under terms of and subject to all the conditions, limitations and restrictions contained in said Act of Congress approved March 2nd, 1889, and the laws of the United States applicable thereto. That Congress of the United States and the President, in the manner aforesaid, expressly withheld said land from claim and settlement of all persons.

13. Defendant further alleges that the Organic Act which took effect May 2, 1890, expressly recognized rights of way and land for station grounds previously granted to railroad corporations as the property of such railroad corporations and not subject to settlement or the claim of any person who might attempt to settle upon or lay claim to said right of way and station grounds or any part thereof.

14. Defendant further alleges that at the time the said Naoma Noble and George Noble originally attempted to [fol. 41] settle upon and acquire rights in said land they had actual and constructive notice of said Acts of Congress which took effect February 18, 1888 and February 13, 1889, and that the land was located upon the route from the coal leases of said railway company in Tobucksey County, Choctaw Nation to a place on the A. T. & S. F. line of railroad between Halifax and North Canadian River, as designated by said Acts of Congress; that said railway company had accepted the terms of said Acts and that it was then complying with all the terms and conditions thereof and owned the title to said land. And defendant further alleges that the said Naoma Noble and George Noble had actual and constructive notice of the Act of Congress opening the country for settlement and the President's said Proclamation and knew that the land described in plaintiffs' petition

was not open to settlement and the rightful claim of any person whatsoever save and except the said Railway Company, and that his attempt to acquire title to said land or an interest therein was contrary to the laws of the United States and the terms of said Proclamation, and in violation of the rights of said railway company as defined and set forth in said Acts of Congress.

Defendant further alleges that if the terms of said patent to said townsite trustees are broad enough to include the land owned by said railway company and claimed by plaintiff as aforesaid, the United States Land Office was wholly without authority by reason of the facts hereinbefore alleged, to include said land in said patent and did not intend [fol. 42] to include the same therein; and that said townsite trustees took said patent with actual and constructive notice of said Acts of Congress and all the facts aforesaid including the ownership of said land by said railway company.

And defendant further alleges that if the said Naoma Noble did acquire a deed from said townsite trustees, which is not admitted but is hereby expressly denied, she acquired said deed with actual and constructive notice of the said rights and title of said railway company as hereinebefore alleged and knew at the time that said deed conveyed to her no right, title or interest in said land or any part thereof.

The defendant therefore charges and alleges, that by reasons of the Acts of Congress, the President's Proclamation, and the facts aforesaid the said Naoma Noble never acquired any right, title or interest in said land or any part thereof, and that now plaintiffs have no right, title or interest therein.

15. Defendant further avers that Congress passed an Act which was approved March 3, 1905, whereby it authorized the Choctaw Oklahoma & Gulf Railroad Company to lease or sell its line of railroad running over the land involved in this suit to the Chicago Rock Island & Pacific Railway Company. That said Act of Congress is published in 33 United States Statutes at Large, p. 991, to which reference is hereby made and same is hereby adopted as a part of this Answer. That pursuant to said Act of Con- [fol. 43] gress the said Choctaw, Oklahoma & Gulf Railroad Company leased all the property and franchises of

the said Choctaw, Oklahoma & Gulf Railroad Company, comprising the right of way and station grounds including the property described in plaintiffs' petition, to the said Chicago, Rock Island & Pacific Railway Company, for nine hundred and ninety nine years.

16. Defendant further avers that the said Choctaw Oklahoma & Gulf Railroad Company and the Chicago, Rock Island & Pacific Railway Company made application to the Interstate Commerce Commission of the United States for a Certificate of Public Convenience and Necessity, granting them permission to abandon a portion of their line of railroad through Oklahoma City, Oklahoma, including that part of the line which runs over the property described in plaintiffs' petition and that on the 9th day of April, 1928, the said Interstate Commerce Commission granted the Certificate of Public Convenience and Necessity as applied for, which is in letters, figures and terms as plaintiffs' Exhibit "D," attached to their petition.

17. Defendant further alleges that on the 4th day of December, 1928, the said Railroad Companies, for a valuable consideration, executed and delivered to defendant an instrument of conveyance termed a Quit Claim Deed, whereby said Railroad Companies conveyed all their right, title and interest in and to all said abandoned right of way and station grounds, including the real estate described in [fol. 44] plaintiffs' petition as alleged in his petition.

18. That thereafter, on the 4th day of December, 1930, the said railroad companies wholly abandoned their right of way and station grounds over and upon the land described in plaintiffs' petition and delivered possession thereof to the defendant and thereafter, on the said 4th day of December, 1930, the United States District Court, in and for the Western District of Oklahoma, in the case of The City of Oklahoma City, Oklahoma, a Municipal Corporation, Complainant, vs. The Chicago, Rock Island & Pacific Railway Company and the Choctaw, Oklahoma & Gulf Railroad Company, a corporation, defendants, the said case bearing Docket No. 1174 in Equity, entered a decree holding and declaring that the said railroad companies on the 4th day of December, 1930, wholly abandoned the said right of way and station grounds including the property described in plaintiffs' petition and that under

and by virtue of the Act of Congress approved March 8, 1922, 42 U. S. Statutes at Large, p. 414, U. S. C. A. Chap. 43, Section 912, all the right, title, claim and interest in and to said property became absolutely vested in fee simple in the defendant.

A copy of the said decree is hereto attached, marked Exhibit "G" and made a part hereof.

19. Defendant further charges and alleges that the plaintiff never at any time had any right, title or interest or valid claim in or to the land described in his petition or any part thereof. That the defendant, by reason of the [fol. 45] facts aforesaid, being a municipal corporation, through which said abandoned right of way runs, became the owner thereof upon abandonment and the judicial determination thereof, as aforesaid and is now the owner of the fee title to said land.

Cross Petition

For cross petition against the plaintiffs the defendant hereby adopts by reference, all the facts and allegations made and set forth in Counts II and III of its Answer herein and makes the same as much a part of this Cross Petition as if fully set out herein by re-writing, and alleges further:

That said alleged deed of Naoma Noble and plaintiffs' claim to the land is wholly unfounded and without right, but notwithstanding this fact, said alleged deed and claim constitute a cloud upon defendant's title to said land and renders the title thereto objectionable and if permitted to remain upon and against said land the defendant will suffer irreparable injury, damage and loss, by reason thereof.

Wherefore, premises considered, defendant prays that the plaintiffs take nothing by this action; that said alleged deed to Naoma Noble be cancelled and held for naught, in so far as the said deed relates to the property described in plaintiffs' petition and that the fee simple title to said land be decreed in defendant and fully quieted in defendant [fol. 46] as against plaintiffs and all persons whomsoever; and that all persons claiming by, through or under plaintiffs be forever barred and enjoined from asserting claim to any title or interest to or in said land or any part thereof, and that defendant recover all costs and be granted such

other further and different relief as to the Court may seem equitable and proper in the premises.

A. L. Hull, Municipal Counselor; W. H. Brown, Special Assistant, Attorneys for Defendant.

[fol. 47] EXHIBIT "A" TO ANSWER

United States at Large, 50th Congress

1887-1889

Session I, Ch. 13, 1888, Vol. 25, page 35

Chap. 13.—An Act to authorize the Choctaw Coal and Railway Company to construct and operate a railway through the Indian Territory, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled:

That the Choctaw Coal and Railway Company, a corporation created under and by virtue of the laws of the State of Minnesota, be, and the same is hereby, invested and empowered with the right of locating, constructing, owning, equipping, operating, using and maintaining a railway and telegraph and telephone line through the Indian Territory, beginning at a point on Red River (the southern boundary line) at the bluff known as Rocky Cliff in the Indian Territory, and running thence by the most feasible and practicable route through the said Indian Territory to a point on the east boundary line, immediately contiguous to the west boundary line of Polk or Sevier Counties in the State of Arkansas; also, a branch line of railway to be constructed from the most suitable point on said main line for obtaining a feasible and practicable route in a northwesterly direction to the leased coal veins of said Choctaw Coal and Railway Company in Tobucksey County, Choctaw Nation; with the right to construct, use, [fol. 48] and maintain such tracks, turnouts, branches and sidings and extensions as said company may deem it in their interest to construct along and upon the right of way and depot grounds therein provided for.

Sec. 2. That said corporation is authorized to take and use and for all purposes of railway, and for no other pur-

poses, a right of way one hundred feet in width, through said Indian Territory for said main line and branch of the Choctaw Coal and Railway Company; and to take and use a strip of land two hundred feet in width, with a length of three thousand feet, in addition to right of way, for stations, for every ~~then~~ miles of road, with the right to use such additional grounds where there are heavy cuts or fills as may be necessary for the construction and maintenance of the roadbed, not exceeding one hundred feet in width on each side of said right of way, or as much thereof as may be included in said cut or fill; Provided, That no more than said addition of land shall be taken for any one station; Provided Further, that no part of the lands herein authorized to be taken shall be leased or sold by the company, and they shall not be used except in such manner and for such purpose only as shall be necessary for the construction and convenient operation of said railroad, telegraph, and telephone lines; and when any portion thereof shall cease to be so used, such portion shall revert to the nation or tribe of Indians from which the same shall be taken.

[fol. 49] Sec. 3. That before said railway shall be constructed through any lands held by individual occupants according to the laws, customs, and usages of any of the Indian Nations or tribes through which it may be constructed, full compensation shall be made to such occupants for all property to be taken or damage done by reason of the construction of such railway. In case of failure to make amicable settlement with any occupant such compensation shall be determined by the appraisement of three disinterested referees, to be appointed, one (who shall act as chairman) by the President, one by the chief of the nation to which said occupant belonged, and one by said railway company, who, before entering upon the duties of their appointment, shall take and subscribe before a district judge, clerk of a district court, or United States Commissioners, an oath that they will faithfully and impartially discharge the duties of their appointment, which oath, duly certified, shall be returned with their award to, and filed with the Secretary of the Interior within sixty days from the completion thereof; and a majority of said referees shall be competent to act in case of the absence of a member, after due notice. And upon the failure of either party

to make such appointment within thirty days after the appointment made by the President, the vacancy shall be filled by the district judge of the court held at Fort Smith, Arkansas, or by the district judge of the northern district of Texas, upon the application of the other party. The chairman of said board shall appoint the time and place [fol. 50] for all hearings, within the nation to which said occupant belongs. Each of said referees shall receive for his services the sum of four dollars per day for each day they are engaged in the trial of any case submitted to them under this Act, with mileage at five cents per mile. Witnesses shall receive the usual fees allowed by the courts of said nations. Costs, including compensation of the referees, shall be made a part of the award, and be paid by such railroad company. In case the referees cannot agree, then any two of them are authorized to make the award. Either part- being dissatisfied with the findings of the referees shall have the right within ninety days after the making of the award and notice of the same, to appeal by original petition to the district court for the northern district of Texas, which court shall have jurisdiction to hear and determine the subject-matter of said petition, according to the laws of the State in which the same shall be heard provided for determining the damage when property is taken for railroad purposes. If upon the hearing of said appeal the judgment of the court shall be for a larger sum than the award of the referees the costs of said appeal shall be adjudged against the railway company. If the judgment of the court shall be for the same sum as the award of the referees, then the costs shall be adjudged against the appellant. If the judgment of the court shall be for a smaller sum than the award of the referees, then the costs shall be adjudged against the party claiming damages. When proceedings have been commenced in [fol. 51] court, the railway company shall pay double the amount of the award into court to abide the judgment thereof, and then have the right to enter upon the property sought to be condemned and proceed with the construction of the railroad.

Sec. 4. That said railway company shall not charge the inhabitants of said Territory a greater rate of freight than the rate authorized by the laws of the State of Arkansas and Texas for services and transportation of the same

kind; Provided, That passenger rates on said railway shall not exceed three cents per mile. Congress hereby reserves the right to regulate the charges for freight and passengers on said railway and messages on said telegraph and telephone lines, until a State government or governments shall exist in said Territory with (in) the limits of which said railway, or a part thereof, shall be located; and then such State government or governments shall be authorized to fix and regulate the cost of transportation of persons and freight within their respective limits by said railway; but Congress expressly reserves the right to fix and regulate at all times the cost of such transportation by said railway or said company whenever such transportation shall extend from one State into another, or shall extend into more than one State; Provided, However, That the rate of such transportation of passengers, local or interstate, shall not exceed the rate above expressed and Providing Further, That said railway company shall carry the mail at such prices as Congress may by law provide; and until such [fol. 52] rate is fixed by law the Postmaster-General may fix the rate of compensation.

Sec. 5. That said railway company shall pay to the Secretary of the Interior, for the benefit of the particular nation or tribes through whose lands the said railway may be located, the sum of fifty dollars, in addition to compensation provided for in this Act, for property taken and damages done to individual occupants by the construction of the railway; for each mile of railway that it may construct in said Territory, said payments to be made in installments of five hundred dollars as each ten miles of road is graded: Provided, That if the general council of either of the nations or tribes through whose lands said railway may be located shall, within four months after the filing of maps of definite location as set forth in section six of this Act dissent from the allowance hereinbefore provided for, and shall certify the same to the Secretary of the Interior, then all compensation to be paid to such dissenting nation or tribe under the provisions of this Act shall be determined as provided in section three for the determination of the compensation to be paid to the individual occupant of lands, with the right to appeal to the courts upon the same terms, conditions, and requirements as therein provided; Provided Further, That the amount awarded or

adjudged to be paid by said railway company for said dissenting nation or tribe shall be in lieu of the compensation that said nation or tribe would be entitled to receive under the foregoing provision. Said company shall also [fol. 53] pay, so long as said Territory is owned and occupied by the Indians, to the Secretary of the Interior, the sum of fifteen dollars per annum for each mile of railway it shall construct in the said Territory. The money paid to the Secretary of the Interior under the provisions of this Act shall be apportioned by him, in accordance with the laws and treaties now in force, between the United States and said nations and tribes, according to the number of miles of railway that may be constructed by said railway company through their land; Provided, That Congress shall have the right so long as said lands are occupied and possessed by said nations and tribes, to impose such additional taxes upon said railroad as it may deem just and proper for their benefit; and any Territory or State hereafter formed, through which said railway shall have been established, may exercise the like power as to such part of said railway as may lie within its limits. Said railway company shall have the right to survey and locate its railway immediately after the passage of this Act.

Sec. 6. That said company shall cause maps showing the route of its located lines through said Territory to be filed in the office of the Secretary of the Interior, and also to be filed in the office of the principal chief of each of the nations or tribes through whose lands said railway may be located; and after the filing of said maps no claim for a subsequent settlement and improvement upon the right of way shown by said maps shall be valid against said company; Provided, [fol. 54] That when a map showing any portion of said railway company's located line is filed as herein provided for, said company shall commence grading said located line within six months thereafter, or such location shall be void; and said location shall be approved by the Secretary of the Interior in sections of twenty-five miles before construction of any section shall be begun.

Sec. 7. That the officers, servants, and employees of said company necessary to the construction and management of said road shall be allowed to reside, while so managed, upon such right of way, but subject to the provisions of

the Indian intercourse, and such rules and regulations as may be established by the Secretary of the Interior in accordance with said intercourse laws.

Sec. 8. That the United States circuit and district courts for the Western district of Arkansas and the northern district of Arkansas and the northern district of Texas, and such other courts as may be authorized by Congress, shall have, without reference to the amounts in controversy, concurrent jurisdiction over all controversies arising between said Choctaw Coal and Railway Company and the nations and tribes through whose territory said railway shall be constructed. Said courts shall have like jurisdiction, without reference to the amount in controversy, over all controversies arising between the inhabitants of said nations or tribes and said railway company; and the civil jurisdiction of said courts is hereby extended within the limits of said Indian Territory, without distrinction as to [fol. 55] citizenship of parties, so far as may be necessary to carry out the provisions of this Act.

Sec. 9. That said railway company shall build at least one hundred miles of the railway in said Territory within three years after the passage of this Act, and complete the main line of the same within said Territory within one year thereafter, or the rights herein granted shall be forfeited as to that portion not built; that said railroad company shall construct and maintain continually all road and highway crossings and necessary bridges over said railway wherever said roads and highways do now or may hereafter cross said railway's right of way, or may be by the proper authorities laid out across the same.

Sec. 10. That the said Choctaw Coal and Railway Company shall accept this right of way upon the express condition, binding upon itself, its successors and assigns, that they will neither aid, advise, nor assist in any effort looking towards the changing or extinguishing the present tenure of the Indians in their land, and will not attempt to secure from the Indian nations any further grant or land, or its occupancy, than is hereinbefore provided: Provided, That any violation of the condition mentioned in this section shall operate as a forfeiture of all the rights and privileges of said railway company under this Act.

Sec. 11. That all mortgages executed by said railway company conveying any portion of its railroad, with its [fol. 56] franchises, that may be constructed in said Indian Territory shall be recorded in the Department of the Interior, and the record thereof shall be evidence and notice of their execution, and shall convey all rights and property of said company as therein expressed.

Sec. 12. That Congress may at any time amend, add to, alter, or repeal this Act.

Sec. 13. That the right of way herein and hereby granted shall not be assigned or transferred in any form whatever prior to the construction and completion of the road, except as to mortgages or other liens that may be given or secured thereon to aid in the construction thereof.

Approved, February 18, 1888.

[fol. 57] EXHIBIT "B" TO ANSWER

United States Statutes at Large, 50th Congress

1887-1889

Session II, Ch. 152, 1889, Vol. 25, Page 668

Chap. 152.—An Act to amend an Act entitled "An Act to authorize the Choctaw Coal and Railway Company to construct and operate a railway through the Indian Territory, and for other purposes, "approved February eighteenth, eighteen hundred and eighty-eight."

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled:

That section one of the Act entitled "An Act to Authorize the Choctaw Coal and Railway Company to construct and operate a railway through the Indian Territory, and for other purposes," approved February eighteenth, eighteen hundred and eight-eight, be, and hereby is, amended to read as follows:

"That the Choctaw Coal and Railway Company, a corporation created under and by virtue of the laws of the State

of Minnesota, be, and the same is hereby invested and empowered with the right of locating, constructing, owning, equipping, operating, using, and maintaining a railway and telegraph and telephone line through the Indian Territory, beginning at a point on the Red River (the southern boundary line), at the bluff known as Rocky Cliff, in the Indian [fol. 58] Territory, and running thence by the most feasible and practicable route through the said Indian Territory to a point on the east boundary-line of the State of Arkansas; also, a branch line of railway to be constructed from the most suitable point on said main line for obtaining a feasible and practicable route in a westerly or northwesterly direction to the leased coal veins of said Choctaw Coal and Railway Company, in Tobucksey County, Choctaw Nation, and thence by the most feasible and practicable route to an intersection with the Atchison, Topeka and Santa Fe Railway at the most convenient point between Halifax Station and Ear Creek, otherwise known as the north fork of the Canadian River; with the right to construct, use and maintain such tracks, turnouts, branches, and sidings and extensions as said company may deem it in their interest to construct along and upon the right of way and depot grounds herein provided for."

Approved, February 13, 1889.

[fol. 59] EXHIBIT "C" TO ANSWER

United States Statutes at Large, 51st Congress

1889-1891

Session II, Ch. 249, Vol. 26, Page 765

Chap. 249.—An Act to amend Act authorizing Choctaw Coal and Railway Company to construct road through Indian Territory.

Be is enacted by the Senate and House of Representatives of the United States of America in Congress Assembled:

That the provisions of an Act approved February eighteenth, eighteen hundred and eighty-eight, authorizing the

Choctaw Coal and Railway Company to construct and operate a railway through the Indian Territory, and for other purposes, shall be extended for a period of two years, from February eighteenth, eighteen hundred and ninety two, so that said company shall have until February eighteenth, eighteen hundred and ninety-four to build its railway, under the provisions of said Act and the Act amendatory thereof, approved February thirteenth, eighteen hundred and eighty-nine.

Approved February 21, 1891.

[fol. 60] EXHIBIT "D" TO ANSWER

United States Statutes at Large, 53rd Congress

1893-1895

Session II, Ch. 14, Vol. 28, Page 27

Chap. 14.—An Act to extend the time for the construction of the railway of the Choctaw Coal and Railway Company.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled:

That the time for the construction of the railway of the Choctaw Coal and Railway Company, a corporation organized under the laws of the State of Minnesota, which, by the provisions of the Act approved February twenty-first, eighteen hundred and ninety-one, entitled "An Act to amend an Act Authorizing the Choctaw Coal and Railway Company to construct a road through the Indian Territory" will be extended for a period of two years from that date, so that said company shall have until February eighteenth, eighteen hundred and ninety-six, to construct the line of railway authorized by the Act approved February eighteenth, eighteen hundred and eighty-eight, entitled "An Act to authorize the Choctaw Coal and Railway Company to construct and operate a railway through the Indian Territory, and for other purposes," and the Act amendatory thereof, approved February thirteenth, eighteen hundred

and eighty-nine, entitled "An Act to amend an Act entitled "An Act to authorize the Choctaw Coal and Railway Com-
[fol. 61] pany to construct and operate a railway through the Indian Territory, and for other purposes, 'approved February eighteenth, eighteen hundred and eighty-eight'' and for such purpose the said company shall have the right to take and occupy the right of way and depot grounds heretofore granted to it by said Acts.

Approved, January 22, 1894.

A statement of the provisions of the Act of Congress of August 24, 1894, 28 Stat. 502, Exhibit E to defendant's answer, is set forth in paragraphs 7 and 8 of the answer, pages 37-38, supra, and the Act is not reproduced here.

[fol. 62] EXHIBIT "F" TO ANSWER

United States Statutes at Large, 54th Congress

1895-1897

Sess. I, Ch. 122, 1898, Vol. 29, P. 98

Chap. 122. An Act to amend an Act approved August Twenty-fourth, eighteen hundred and ninety-four, entitled "An Act to authorize purchasers of the property and franchises of the Choctaw Coal and Railway Company to organize a corporation and to confer upon the same all the power, privileges and franchises vested in that company."

Whereas, pursuant to the authority conferred in and by the Act of which this is amendatory, a corporation was fully organized by the name and style of the Choctaw, Oklahoma and Gulf Railroad Company by the purchasers of the property and franchise formerly of the Choctaw Coal and Railway Company, and it is desirable that the powers of said corporation should be defined as hereinafter provided:

Therefore, be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

That the power to construct, and operate branches, including those mentioned in section two of this Act, conferred in and by section four of the Act approved August twenty-fourth, eighteen hundred and ninety-four, entitled "An Act to authorize purchasers of the property and franchises of the Choctaw Coal and Railway Company to organ- [fol. 63] ize a corporation and to confer upon the same all the powers, privileges, and franchises vested in that company; shall be exercisable in the Indian Terriitory only after maps showing the location of such branches shall have been filed with and approved by the Secretary of the Interior.

Sec. 2. That the powers conferred by said section four shall extend to branches intended to aid the development of any coal or timber territory contiguous or tributary to the lines of railroad of the said Choctaw, Oklahoma and Gulf Railroad Company, whether owner or controlled by said company or by others, said branches not to exceed in length five miles, and to the construction and operation of a branch from any point on its existing line of railroad to the northern line of the State of Texas, and for this purpose the said company shall have the like rights, powers, and franchises, as to the acquisition of a right of way and depot grounds, and as to the construction and operation of said branch, and shall be subject to the like conditions and restrictions as it possesses or is subject to under or by virtue of the provisions of the said Act of August twenty-fourth, eighteen hundred and ninety-four as to the line of railroad acquired or constructed thereunder.

Sec. 3. That the line of railroad which has been heretofore constructed shall be regarded and treated as a full compliance by said company with the requirements of the Act applicable to it, by which it was required, as a condition of further construction thereafter, to complete its main [fol. 64] line prior to February eighteenth, eighteen hundred and ninety-six, and said company may exercise from time to time the rights, powers, and franchises heretofore or by this Act conefrred as to further extensions of our branches from its existing line.

Approved April 24, 1896.

[fol. 65] EXHIBIT "G" TO ANSWER

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF OKLAHOMA

In Equity. No. 1174

THE CITY OF OKLAHOMA CITY, OKLAHOMA, a Municipal Corporation, Complainant,

vs.

CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY, and the Choctaw, Oklahoma and Gulf Railroad Company, Corporations, Defendants

Decree

This cause came on to be heard in regular order, and the complainant was represented by W. M. McKenzie, Municipal Counselor, Solicitor of Record, and the defendants were represented by W. R. Bleakmore, Solicitor of Record, and said cause was submitted to the Court on its merits.

The Court finds that the parties are corporations, as alleged in the Bill of Complaint, and that jurisdiction rests in this Court for the reason that the amount involved is in excess of Three Thousand ($3,000.00) Dollars, and the cause of action arises under and by virtue of the laws of the United States.

The Court further finds that title to the property hereinafter set out was acquired by the defendants under the [fol. 66] Act of February 18, 1888, passed by the Congress, which was amended by various Acts, authorizing construction of lines of railway through a part of the public domain, which was then the Indian Territory, now the State of Oklahoma, and that said lines of railway, pursuant to said Acts, were constructed, and that on the 4th day of December, 1930, the defendants, being owners, lessees and operators of the line of railway over the property hereinafter described, completely abandoned the same, surrendered possession to the City of Oklahoma City on the 4th day of December, 1930, and are now without interest, right, title of equity in and to said property by reason of the abandonment thereof for railroad purposes.

It is by the Court, therefore, decreed that the defendants, Chicago, Rock Island and Pacific Railway Company, and

the Choctaw, Oklahoma & Gulf Railroad Company, have abandoned and forfeited all of their right, title and interest in and to the following described property in the City of Oklahoma City, Oklahoma County, State of Oklahoma, and more particularly described as follows:

The North forty (40) feet of Lots Thirty seven (37) to Forty (40), and the North Forty (40) feet of Lots Twenty-three (23) to Thirty-two (32), and the South Forty (40) feet of Lots Thirteen (13) to Twenty-two (22), and the South Forty (40) feet of Lots Thirty-three (33) to Thirty-Six (36), and all of Lots Five (5), Six (6), Seven, Twenty-[fol. 67] one (21), aforesaid, lying between a line drawn Forty (40) feet North of and parallel to the North line of said East and West alley extended, and a line drawn parallel to and Forty (40) feet South of the South line of said East and West alley extended;

Also that part of Robinson Avenue between Blocks Twenty-one (21) and Thirty-six (36) of the Original Town of Oklahoma City, Oklahoma, lying South of a line drawn parallel to and Fifty (50) feet North of the center line of the vacated East and West alleys in Block Twenty-one (21) and Thirty-six (36), aforesaid, extended, and North of a line drawn parallel to and Fifty (50) feet South of the center line of said vacated East and West alleys extended;

Also the North Forty (40) feet of Lots One (1) to Sixteen (16) and the South Forty (40) feet of Lots Seventeen (17) to Thirty-two (32) in Block Thirty-six (36), in the Original Town of Oklahoma City, and the vacated East and West alley in Block Thirty-six (36) of the Original Town of Oklahoma City, Oklahoma;

Also that part of Harvey Avenue between Blocks Thirty-six (36) and Forty-nine (40) in the original Town of Oklahoma City, lying South of a line drawn parallel to and Fifty (50) feet North of the center line of the vacated East [fol. 68] and West alleys in said Blocks Thirty-six (36) and Forty-nine (49) extended and North of a line drawn parallel to and Fifty (50) feet South of the center line of said vacated East and West alleys extended;

Also the North Forty (40) feet of Lots One (1) to Sixteen (16) inclusive, and the South Forty (40) feet of lots Seventeen (17) to Thirty-two (32) inclusive, in Block Forty-nine (49), in the Original Town of Oklahoma City;

Also the vacated East and West alley in Block Forty-

nine (40) in the Original Town of Oklahoma City, Oklahoma;

Also that part of Hudson Avenue between Blocks Forty-nine (49) and Sixty-four (64) of the Original town of Oklahoma City, Oklahoma, lying South of a line drawn parallel to and Fifty (50) feet North of the center line of the vacated East and West alleys in Blocks Forty-nine (49) and Sixty four (64) extended, and North of a line parallel to and Fifty (50) feet south of the center line of said vacated East and West alleys extended;

Also the North Forty (40) feet of Lots One (1) to Nineteen (19) inclusive, and the South Forty (40) feet of Lots Twenty (20) to Thirty-eight (38) inclusive and the East and West alley in Block Sixty four (64) in the original town of Oklahoma City;

[fol. 69] Also a strip of ground One Hundred (100) feet in width in the Southwest Quarter of Section Thirty-three (33), Township Twelve (12) North, Range Three (3) West, I. M., in Oklahoma County, Oklahoma, being Fifty (50) feet on each side of the center line of the main track of the Choctaw, Oklahoma & Gulf Railroad Company as constructed and located and extending from the west line of Block Sixty four (64) of the Original Town of Oklahoma City, Oklahoma, is a westerly direction a distance of Thirteen Hundred Seventy (1370) feet, more or less, to the West line of Shartel Avenue, extended North across said strip of ground, being formerly the right of way taken by the Choctaw, Coal & Railway Company out of the public domain in said Quarter Section herein last above mentioned and by conveyances assigned, transferred and delivered to the defendants in this action.

All of Lots Four (4), Twenty-seven (27) and Twenty-eight (28), and all of the East Half of Lot Twenty-nine (29); also all of Lots Twenty-four (24), Twenty-five (25) and Twenty-six (26), except the North Forty (40) feet thereof; also all those parts of Lots Twenty-nine (29), Thirty (30), Thirty-one (31) and Thirty-two (32) described as follows:

Commencing on the south line of the right of way of the Choctaw, Oklahoma & Gulf Railroad Company at a point [fol. 70] Twelve and Five-tenths (12.5) feet west of the east line of Lot Twenty-nine (29); thence south Fourteen (14) feet; thence on a quarter circle with a radius of Seven (7) feet to a point Seven (7) feet west and Seven (7) feet

south of the place of beginning; thence west parallel with the south line of said right-of-way to a point three (3) feet east of the west line of Lot Thirty-two (32) aforesaid; thence southwest intersecting the west line of said Lot thirty-two (32) at a point Ten (10) feet south of said right of way; thence north to said right of way; thence east along the south line of said right of way to the place of beginning; all in Block eight (8) of the Original Town of Oklahoma City, Oklahoma.

Also a part of the Southwest Quarter of Section Thirty-three (33), Township Twelve (12) North Range Three (3) West; bounded and described as follows:

Commencing at a point where the North line of the right of way of the St. Louis-San Francisco Railway Company, formerly the Oklahoma Terminal Railroad Company, intersects the southerly line of the right of way of the Choctaw, Oklahoma & Gulf Railroad Company; thence southwesterly along the north right of way of the St. Louis-San Francisco Railway Company a distance of One Hundred Sixty five [fol. 71] (165) feet, more or less, to the west line of Shartel Avenue produced north in said City; thence north along the said west line produced north a distance of Fifty (50) feet, more or less, to the southerly line of the right of way of the Choctaw, Oklahoma and Gulf Railroad Company; thence easterly along said southerly right of way line a distance of One Hundred Sixty (160) feet, more or less, to the point of beginning, containing Four Thousand (4,000) square feet, more or less;

and by virtue of the Act approved March 9, 1922, 42 U. S. Statutes at Large, 414, U. S. C. A. Chap. 43, Section 912, all of the right, title, claim and interest in and to said property hereinabove described, as decreed to be vested absolutely and completely in the complainant, the City of Oklahoma City, Oklahoma, and the title of the complainant is quieted and set at rest against any and all claims, demands or interests of whatsoever nature of the defendants therein.

Witness my hand this 5th day of December, 1930.

Edgar S. Vaught, United States District Judge.

O. K. M. W. McKinzie, Solicitor for Complainant.

O. K. W. R. Bleakmore, Solicitor of Defendants.

Endorsed: Filed December 5, 1930, Theodore M. Filson, Clerk, by Grace O. Butler, Deputy.

[fol. 72] [File endorsement omitted.]

[fol. 73] IN THE DISTRICT COURT OF OKLAHOMA COUNTY

[Title omitted.]

REPLY AND ANSWER TO CROSS PETITION—Filed March 30, 1931

Come now the plaintiffs above named and for their reply to the answer, and answer to the cross petition of the defendant filed herein, allege and say:

1. That they deny every material allegation in said answer and cross petition contained, except such as admit or do not contradict, or are not in conflict with the allegations of their petition, and except such as are hereinafter specifically admitted.

[fol. 74] 2. That they admit the enactment of the several and various Acts of Congress and the promulgation of the proclamation by the President of the United States as pleaded and set forth in the defendant's answer and cross petition, but deny the conclusions and argument drawn therefrom and the construction and interpretation placed thereon by the defendant in its said answer and cross petition, and deny that said Acts of Congress and the said proclamation have the meaning or contain the terms and provisions in precise language or in substance or effect as alleged by the defendant in its said answer and cross petition.

3. That they deny that the Act of Congress approved March 8, 1922, 42 Statutes 414, Title 43, Section 912, U. S. Code, has any application to the subject matter of this action or to the title of the plaintiffs to the real estate involved herein, for that the title to said real estate became vested in Naoma Noble through whom the plaintiffs derive their title, by title derived from the United States more than thirty-one years prior to the enactment of said Act of Congress, and they aver that if it should be deemed and held that said Act of Congress did apply to the subject matter of this action, and to the plaintiffs' title to the real estate involved herein, then said Act of Congress is unconstitutional and void, for that it is in contravention of the Fifth Amendment to the Constitution of the United States in that it would have the effect to deprive the plain-

tiffs of their property without due process of law and to [fol. 75] impair the obligation of a contract.

4. That they aver that under the provisions of the Act of Congress of March 3, 1891, 26 Statutes 1099, Title 43, Section 1166, U. S. Code, the United States may not bring suit to vacate or annul any patent to real estate theretofore issued by it unless such suit is brought within five years after the passage of said Act, and that, therefore, the United States could not by suit, and the Congress could not by the enactment of a statute such as said Act of March 8, 1922, more than thirty-one years after the passage of said Act of March 3, 1891, and the issuance of the patent to the real estate here involved, Exhibit A to the plaintiffs' petition, cancel or annul such patent and revest the title to the real estate therein described, or any part thereof, in the United States.

5. That by reason of its said patent, Exhibit A to the plaintiffs' petition, the United States was and is estopped to assert that the real estate described therein was not public lands and was not a part of the public domain, and was and is estopped to assert that it had and retained any right, title, interest or estate in or to any part thereof, subject to the use of the same for a railroad right of way, which the Congress might dispose of upon the cessation of the use and occupancy thereof for such purpose, and the defendant is likewise estopped to assert any right, title, interest or estate in or to the particular real estate involved in this action as derived by it from the United States under the provisions of said Act of Congress, of March 8, 1922.

[fol. 76] 6. That they aver that the defendant derives all and whatever claim of right, title, interest or estate it may have to the real estate involved in this action by quit claim deed from the Choctaw, Oklahoma and Gulf Railroad Company and the Chicago, Rock Island and Pacific Railway Company, and that said grantors in said deed derived all of their title thereto as successors to, and by, through and from, the Choctaw Coal and Railway Company, and that it and they were and are estopped, and the defendant as their successor in title is estopped, to deny the title of the said Naoma Noble to said real estate on and prior to the 28th day of March, 1891, by reason of the fact that

the said Choctaw Coal and Railway Company did on said 28th day of March, 1891, purchase, receive and accept from the said Naoma Noble the said right of way deed, Exhibit C to the plaintiffs' petition, which contained the express limitation and condition on the grant of the real estate therein described that if and when the same was abandoned and ceased to be used for railroad purposes, it should revert to the grantor, his heirs or assigns, and thereby said railway company contracted and agreed with the said Naoma Noble that said real estate would revert to him or his heirs when its use for railroad purposes was abandoned and ceased, and the plaintiffs as heirs to the title of the said Naoma Noble to said real estate have all the rights under said right of way deed which said Naoma Noble would have if living.

[fol. 77]. 7. That they aver that the said railroad companies above named, and each and all of them, also were and are estopped, and the defendant as their grantee also is estopped, from denying that the said Naoma Noble was vested with the absolute fee simple title to said real estate on and prior to the — day of April, 1891, and that the plaintiffs are now vested with such title thereto, for that on said date the said Choctaw Coal and Railway Company began a proceeding in the District Court of Oklahoma County, in the Territory of Oklahoma, for the condemnation of a railroad right of way across the said real estate, and alleged in said proceeding that the said Naoma Noble was the owner of said real estate and had refused to sell said railroad company a right of way across the same at a price that said railroad company deemed reasonable and was willing to pay, and prayed that the court appoint commissioners to assess and appraise the value of said real estate and the damages that would be suffered by the said Naoma Noble upon the taking and condemnation of the same for its railroad right of way, and that upon the determination, assessment and payment of such damages, it should be allowed to take, appropriate and use said real estate for its railroad right of way, and pursuant to said application, notice was duly served on the said Naoma Noble and commissioners were duly appointed and qualified, did on the 26th day of May, 1891, file in said court in said proceeding their report of the damages and injury done to the land of the said Naoma

Noble and to him as the owner thereof, and also the dam-
[fol. 78] ages and injury done to other similar lands and the owners thereof, and did in said report fix and determine the amount of such damages and injury to the said Naoma Noble at the sum of $40.00, the said condemnation proceeding being entitled "In the Matter of the application of the Choctaw Coal and Railway Company to condemn certain property in the County of Oklahoma," and being cause No. 212 on the docket of said court.

8. That they aver that the said Choctaw Coal and Railway Company did not take, nor claim, intend or pretend to take, title to its right of way across the real estate involved in this action under and by authority of the provisions of the said Act of Congress of February 18, 1888, as amended by said Act of Congress of February 13, 1889, and did not at any time file in the office of the Secretary of the Interior a map showing the route of its located line of road over said real estate, and further that if it did in fact file such a location map showing its line passing over said real estate, which the plaintiffs do not admit, then the same was not filed until after the right of the said Naoma Noble to acquire from the United States the title to the said real estate had attached thereto nor until after it had filed such a location map showing its line passing by and around, and not over and across, the said real estate, which filing of such map exhausted its right to make location of its said line of road under the provisions of said Acts of Congress and it could not thereafter, and after the rights of the said Naoma Noble had [fol. 79] intervened and attached, relocate its said line under the provisions of said Acts of Congress over and across said real estate, and further that it abandoned, relinquished and waived all claim of right to locate and take its right of way across said real estate under the provisions of said Acts of Congress, for that a dispute and controversy arose between it and the said Naoma Noble together with the claimants to and owners of other city lots similarly situated in said City of Oklahoma City, over its said claim of the right to so locate its said line and thereupon, for the purpose of settling said dispute and controversy and enabling the said railway company to proceed to construct its road through said city, an agreement was entered into between said railway com-

pany on the one hand and said city and its citizens on the other whereby it was agreed that said railway company would abandon, withdraw, relinquish and waive its claim of right to locate and take its right of way through said city under the provisions of said Acts of Congress and upon the route of its line as surveyed and shown on its location map or maps and that in consideration thereof the said city and its citizens would purchase from the owners and would deliver to said railway company the title to a right of way through said city upon a different route for its line; that the plaintiff does not know whether said agreement was oral or in writing, and if in writing does not have and cannot obtain a copy thereof to attach hereto; and that said agreement was fully carried out and fully executed by the parties thereto and a right of way [fol. 80] across the real estate involved in this action was purchased from the said Naoma Noble and the same was conveyed to the said railway company by the deed Exhibit C to the plaintiffs' petition and the said railway company accepted said deed and changed the located route of its line so as to cross said real estate.

9. That they specifically deny that the said Choctaw Coal and Railway Company complied with the provisions of said Act of Congress of February 18, 1888, as amended by said Act of Congress of February 13, 1889, and aver that all and whatever right it ever had to take and use a right of way for its said road over and across the said real estate involved in this action became and was forfeited for non-compliance with the provisions of said Acts of Congress and had ceased to exist prior to the commencement of said condemnation proceedings above referred to and the purchase of the title conveyed by said deed, Exhibit C to plaintiffs' petition.

10. That they admit that upon the abandonment of said real estate by said Choctaw, Oklahoma and Gulf Railroad Company and said Chicago, Rock Island and Pacific Railway Company for a right of way and on December 4, 1930, the District Court of the United States for the Western District of Oklahoma made and entered its judgment and decree in said cause No. 1174—Equity in said Court, adjudging and decreeing that the said railroad companies had abandoned and forfeited all their right,

title and interest in and to the real estate therein described and including the real estate involved in this action, and [fol. 81] that a copy of said judgment and decree is attached as Exhibit G to the defendant's answer and cross petition herein.

11. That they aver that if the defendant, in appropriating and using the real estate involved in this action as and for a public park, as alleged in paragraph 4 of plaintiffs' petition and admitted in paragraph 4 (g) of its answer, without having purchased or attempted to purchase, and without having instituted condemnation proceedings against the plaintiffs' right and title thereto, or having compensated the plaintiffs in any way therefor, and without intending to do so, relies upon and justifies its action under the proviso found in Section 5505 of Compiled Oklahoma Statutes, 1921, which reads as follows, to wit:

"Provided, that in case any corporation or municipality authorized to exercise the right of eminent domain shall have taken and occupied for purposes for which it might have resorted to condemnation proceedings, as provided in this article, any land, without having purchased or condemned the same, the damage thereby inflicted upon the owner of such land shall be determined in the manner provided in this article for condemnation proceedings;"

then that said statute, in so far as it provides or may be construed to provide that the defendant may occupy and remain in possession of said real estate before the compensation and damages to the plaintiffs therefor have [fol. 82] been ascertained and paid, is unconstitutional and void for that it contravenes Section 24 of Article 2 of the Constitution of the State of Oklahoma.

Wherefore, having fully replied to the answer and answered the cross petition of the defendant herein, the plaintiffs pray for judgment in their favor, as in their petition they have prayed.

(Signed) H. L. Goddard, Fred Ptak, and Chas. H. Garnett, Attorneys for Plaintiffs.

[File endorsement omitted.]

[fol. 83] IN THE DISTRICT COURT OF OKLAHOMA COUNTY

[Title omitted]

CAPTION

Be it remembered: That on this 14th day of September, 1931, the same being a regular judicial day of the regular September Term, 1931, the above and foregoing cause coming regularly on for trial on its merits, pursuant to assignment duly made and had and published, and all parties being present by their respective counsel as above stated and all parties having announced ready for trial, and having agreed that said cause be tried by the Court, without the intervention of a jury, thereupon, the opening statement for and on behalf of the respective parties was made to the Court by respective counsel and thereafter the plaintiffs, to sustain the issues on their part, introduced the following evidence, in regular order, to-wit:

[fol. 84] **Statement of the Evidence**

Plaintiffs introduced a certified copy of the record from the General Land Office of the appointment and qualification of the original and subsequent members of Board No. 2 of Townsite Trustees under the Oklahoma Townsite Act of 1890, and of the entry by said Board on September 1, 1890, in the Land Office at Oklahoma City, of the southeast quarter of section 33, township 12 north, range 3 west of the Indian Meridian, as a townsite (C-M. 111-147).

In the entry application following the description of the land appears the following recital:

"Said tract was settled upon as a townsite April 22, 1889, after 12 o'clock noon, and has since been occupied by claimants thereof—who are citizens of the United States—for the purposes of trade and business" (C-M. 112).

Plaintiffs introduced a certified copy of the patent from the United States to Edgar N. Sweet, Levy E. Coe and David H. Hammons, as "Trustees of the townsite of Oklahoma City in the second county in Oklahoma Terri-
[fol. 85] tory in trust for the several use and benefit of the occupants of the townsite of Oklahoma City in said

County and Territory according to their respective interests." The patent recites that entry had been made under the appropriate Acts of Congress for the southeast quarter of section 33, in township 12 north, range 3 west of the Indian Meridian, in Oklahoma Territory, and that full payment had been made by said trustees therefor, and gives and grants to said trustees the said real estate in trust, and to their successors and assigns in trust, for the persons designated (C-M. 150-152). This patent appears in full at page 15, supra.

Plaintiffs introduced a certified copy of a townsite trustees deed to Naoma Noble, dated December 27, 1890, and conveying Lot 6 in Block 36 in Oklahoma City in the County and Territory of Oklahoma, as the same appears from the original plat and survey of said city as approved and filed by the trustees. The deed recites appointment and qualification of the trustees under the provisions of the Townsite Act, and that as such trustees they had entered the southeast quarter of said section 33, upon which the townsite was situated, in trust for the several use and benefit of the occupants thereof according to their respective interests, and had made survey of said townsite into lots, blocks, squares, streets and alleys, and had assessed upon each of the lot the sums of money contemplated by the Townsite Act, and that within the meaning of said Act said grantee was entitled to the lot and had paid the assessment thereon in the sum $3.75. It pur- [fol. 86] ports to grant, convey and confirm the lot to her, her heirs and assigns (C-M. 154-157). This deed appears in full at page 17, supra.

Plaintiffs introduced a certified copy of the right of way deed from Naoma Noble and George Noble, her husband, to the Choctaw Coal and Railway Company, dated March 28, 1891, and conveying 40 feet off the north end of Lot 6, in Block 36, in Oklahoma City, with the stipulation and proviso that the premises conveyed were to be used for railroad purposes and would revert to the grantors, their heirs or assigns, when they ceased to be so used. (C-M. 161). This deed appears in full at page 21, supra.

Plaintiffs introduced a copy certified by the General Land Office of the original plat and survey of the townsite of Oklahoma City, as made, approved and filed by the townsite trustees for said city (C-M. 164-165).

Plaintiffs introduced a certified copy of a certificate of public convenience and necessity issued by the Interstate Commerce Commission, dated April 9, 1928, and authorizing the Choctaw, Oklahoma and Gulf Railroad Company and the Chicago, Rock Island & Pacific Railway Company to abandon a portion of their line of railroad in Oklahoma County, Oklahoma, as described in their application for such certificate (C-M. 172). It was stipulated between counsel that the portion of the line of railroad so authorized to be abandoned included the Noble lot (C-M. 171). This certificate appears in full at page 23, supra.

Plaintiffs introduced in evidence a deed from the Chicago, Rock Island & Pacific Railway Company and the Choctaw, [fol. 87] Oklahoma and Gulf Railroad Company to the City of Oklahoma City, dated December 4, 1928, by which the grantors conveyed and quit claimed to the grantee the north forty (40) feet of the Noble lot, together with many other lots and parts of lots (C-M. 174-184).

Plaintiffs introduced in evidence a decree of the United States District Court for the Western District of Oklahoma, in case No. 1174 in Equity, in which the City of Oklahoma City was complainant and the railroad companies last mentioned were defendants, dated December 5, 1930, and in which the Court found and adjudged that the defendants as owners, lessees and operators of the line of railway over the property described therein, in which was included the Noble lot, completely abandoned the same and surrendered possession thereof to the City of Oklahoma City, on December 4, 1930, and were without interest, right, title or equity in said property by reason of their abandonment thereof for railroad purposes, and that by virtue of the Act of Congress approved March 8, 1922 (42 Stat. 414; Title 43, Sec. 912, U. S. Code), all of the title and interest of the defendants to the property described was vested in the complainant and title thereto was quieted in it against all claims and demands of whatsoever nature of the defendants (C-M. 186-193). The plaintiffs were not parties to this action. A copy of this decree was attached as Exhibit G to defendant's Answer and appears in full at page 65, supra.

Plaintiffs introduced the oral testimony of plaintiff William Noble that he was the son of Naoma Noble and of

[fol. 88] George Noble, his co-plaintiff; that Naoma Noble died intestate on August 7, 1924; that he was an only child and that he and his father were her only heirs and her estate was never probated; and that she and her husband, George Noble, were the grantors in the right of way deed conveying the north 40 feet of said Lot 6 in Block 36 to the Choctaw Coal and Railway Company (C-M. 194-197).

It was stipulated by counsel that between December 4, 1930, when the defendant took possession of the lot in question, and the date of the commencement of the present action on January 6, 1931, there had been no improvements made or work done thereon (C-M. 197).

The plaintiffs rested their case.

[fol. 89] Defendant introduced in evidence the Act of Congress of February 18, 1888, 25 Stat. 35, authorizing the Choctaw Railway Company to construct a railway through the Indian Territory (C.M.-199-209); the Act of Congress of February 13, 1889, 25 Stat. 668, amending the Act of February 18, 1888, by authorizing the Choctaw Railway Company to construct a branch from a point on its main line in the Choctaw Nation to a point on the Santa Fe Railway in the northwest corner of the Territory (C.M. 210-212); the Act of Congress of February 21, 1891, 26 Stat. 765, extending to February 18, 1894, the time within which the Choctaw Railway Company was required to complete its road (C.M. 213-214); the Act of Congress of January 22, 1894, 28 Stat. 27, extending to February 18, 1896, the time within which the Choctaw Railway Company was required to complete its road (C.M. 215-217); and the Act of Congress of April 24, 1896, 29 Stat. 98, authorizing the Choctaw Railway Company to construct branches to its road in Indian Territory and declaring that the road already constructed was a full compliance by the company with the requirements of the Act applicable to it (C.M. 226-229). Copies of these Acts were attached as Exhibits A, B, C, D, and F, respectively, to defendants answer and appear in full herein beginning at pages 47, 57, 59, 60, and 62, respectively, supra.

Defendant introduced in evidence the Act of Congress of August 24, 1894, 28 Stat. 502, authorizing the purchasers of the property and franchise of the Choctaw Railway Cor-

pany, which had become insolvent, to organize a new cor-
[fol. 90] poration which should have all the powers, privileges and franchises of the old one (C.M. 218-225). A statement of the provisions of this Act was set out in paragraphs 7 and 8 of the defendant's answer and appears herein at pages 37-38, supra.

Defendant introduced in evidence an Act of Congress, passed April 28, 1904, validating certain conveyances of the Northern Pacific Railroad Company, and the Northern Pacific Railway Company. Said Act was introduced to show that the United States Government claimed and held a proprietary interest in railroad rights of way, which had been granted by Congress. It is found in 33 Stat. at Large, p. 538 (C.M. 316-318).

Defendant introduced an Act of Congress, passed June 24, 1912, legalizing certain conveyances of rights of way made prior to that time, by the Union Pacific Railroad Company, commonly known as the Norris Act, and published in 37 Stat. 138 (C.M. 319-322).

Defendant introduced an Act of Congress, passed October 22, 1919, authorizing the Union Pacific Railroad Company to convey for public road purposes certain parts of its right of way. Said Act is published in 41 Stat. 304 (C.M. 323-325).

Defendant introduced an Act of Congress, passed May 25, 1920, authorizing all Railroad companies to which grants for right of way through public lands had been made by Congress, to convey a portion of such right of way to any state, city or municipality as a public highway or street. Said Act is published in 41 Stat. 621 (C.M. 326-327).

[fol. 91] Defendant introduced in evidence the Act of Congress of March 3, 1905, 33 Stats. 991, authorizing the Choctaw, Oklahoma and Gulf Railroad Company to sell its railway property, rights, privileges and franchises to the Chicago, Rock Island and Pacific Railway Company and authorizing the latter company to buy the same. Under this Act the former company leased all of its railway property, including its right of way over the land involved in these cases, to the latter company for a term of 999 years (C.M. 231-232).

Defendant introduced in evidence the Treaty between the Creek Indians and the United States of June 14, 1866,

14 Stats. 785, the material parts of which are as follows (C.M. 234-253):

Treaty With the Creek Indians. June 14, 1866

Treaty between the United States of America and the Creek Nation of Indians; Concluded June 14, 1866; Ratification advised, with Amendments, July 19, 1866; Amendments accepted July 23, 1866; Proclamated August 11, 1866

Andrew Johnson, President of the United States of America, to all and singular to whom these presents shall come, Greeting:

Whereas a treaty was made and concluded at the city of Washington in the District of Columbia, on the four- [fol. 92] teenth day of June, in the year of our Lord one thousand eight hundred and sixty-six, by and between Dennis N. Cooley and Elijah Sells, Commissioners, on the part of he United States, and Ok-ta-has Harjo, Cow-mikko, and Cotch-cho-chee, delegates at large of the Creek Nation of Indians, and D. N. McIntosh and James M. C. Smith, special delegates of the Southern Creeks, on the part of said Creek Nation of Indians and Southern Creeks, all of which delegates at large and special delegates were duly authorized thereto by said Creek Nation and Southern Creeks, which treaty is in the words and figures following to wit:

Treaty of Cession and Indemnity concluded at the city of Washington on the fourteenth day of June, in the year of our Lord one thousand eight hundred and sixty-six, by and between the United States, represented by Dennis N. Cooley, Commissioner of Indian affairs, Elijah Sells, superintendent of Indian affairs for the Southern superintendency, and Col. Ely S. Parker, special Commissioner, and the Creek Nation of Indians, represented by Ok-tars-sars-harjo, or Sands; Cow-e-to-me-co and Che-chu-chee, delegates at large, and D. N. McIntosh and James Smith, special delegates of the Southern Creeks.

Preamble

Whereas existing treaties between the United States and the Creek Nation have become insufficient to meet their

mutual necessities; and whereas the Creeks made a treaty [fol. 93] with the so-called confederate states, on the tenth day of July, one thousand eight hundred and sixty-one, whereby they ignored their allegiance to the United States, and unsettled the treaty relations existing between the Creeks and the United States, and did so render themselves liable to forfeit to the United States all benefits and advantages enjoyed by them in lands, annuities, protection, and immunities, including their lands and other property held by grant or gift from the United States; and whereas in view of said liabilities the United States require of the Creeks a portion of their land whereon to settle other Indians; and whereas a treaty of peace and amity was entered into between the United States and the Creeks and other tribes at Fort Smith, September tenth, eighteen hundred and sixty-five, whereby the Creeks revoked, cancelled, and repudiated the aforesaid treaty made with the so-called confederate states; and whereas the United States, through its commissioners, in said treaty of peace and amity, promised to enter into treaty with the Creeks to arrange and settle all questions relating to and growing out of said treaty with the so-called confederate states: Now, therefore, the United States, by its commissioners, and the above-named delegates of the Creek Nation, the day and year above mentioned, mutually stipulate and agree, on behalf of the respective parties, as follows, to wit:

[fol. 94] Article III. In compliance with the desire of the United States to locate other Indians and freedmen thereon, the Creeks hereby cede and convey to the United States, to be sold to and used as homes for such other civilized Indians as the United States may choose to settle thereon, the west half of their entire domain, to be divided by a line running north and south; the eastern half of said Creek lands being retained by them shall, except as herein otherwise stipulated, be forever set apart as a home for said Creek Nation; and in consideration of said cession of the west half of their land, estimated to contain three millions two hundred and fifty thousand five hundred and sixty acres, the United States agree to pay the sum of thirty (30) cents per acre, amounting to nine hundred and seventy-five thousand one hundred and sixty-eight dollars, in the manner hereinafter provided, to wit: two hundred thousand dol-

lars shall be paid per capita in money, unless otherwise directed by the President of the United States, upon the ratification of this treaty, to enable the Creeks to occupy, restore, and improve their farms, and to make their nation independent and self-sustaining, and to pay the damages sustained by the mission schools on the north fork and the Arkansas rivers, not to exceed two thousand dollars, and to pay the delegates such per diem as the agent and Creek council may agree upon, as a just and fair compensation, all of which shall be distributed for that purpose [fol. 95] by the agent, with the advice of the Creek council, under the direction of the Secretary of the Interior. One hundred thousand dollars shall be paid to the soldiers that enlisted in the Federal army and the loyal refugee Indians and freedmen who were driven from their homes by the Rebel forces, to reimburse them in proportion to their respective losses; four hundred thousand dollars shall be paid per capita in money to said Creek nation, unless otherwise directed by the President of the United States, under the direction of the Secretary of the Interior, as the same may accrue from the sale of land to other Indians. The United States agree to pay to said Indians, in such manner and for such purposes as the Secretary of the Interior may direct, interest at the rate of five per cent per annum from the date of the ratification of this treaty, on the amount hereinbefore agreed upon for said ceded lands, after deducting the said two hundred thousand dollars; the residue, two hundred and seventy-five thousand one hundred and sixty-eight dollars, shall remain in the treasury of the United States, and the interest thereon, at the rate of five per centum per annum, be annually paid to said Creeks as above stipulated.

Article V. The Creek nation hereby grant a right of way through their lands, to the Choctaw and Chickasaw country, to any company which shall be duly authorized by Congress, and shall, with the express consent and approbation of the Secretary of the Interior, undertake to construct a railroad from any point north of to any point in or south [fol. 96] of the Creek country, and likewise from any point on their eastern to their western or southern boundary, but said railroad company, together with all its agents and employes, shall be subject to the laws of the United States

relating to intercourse with Indian tribes, and also to such rules and regulations as may be prescribed by the Secretary of the Interior for that purpose, and the Creeks agree to sell to the United States, or any company duly authorized as aforesaid, such lands not legally owned or occupied by a member or members of the Creek nation, lying along the line of said contemplated railroad, not exceeding on each side thereof a belt or strip of land three miles in width, at such a price per acre as may be eventually agreed upon between said Creek nation and the party or parties building said road, subject to the approval of the President of the United States: Provided, however, That said land thus sold shall not be reconveyed, leased, or rented to, or be occupied by anyone not a citizen of the Creek nation, according to its laws and recognized useages: Provided, also, That officers, servants, and employes of said railroad necessary to its construction and management shall not be excluded from such necessary occupancy, they being subject to the provisions of the Indian intercourse law and such rules and regulations as may be established by the Secretary of the Interior, nor shall any conveyance of any of said lands be ma le to the party building and managing said [fol. 97] road until its completion as a first-class railroad, and its acceptance as such by the Secretary of the Interior.

Article XI. The stipulations of this treaty are to be full settlement of all claims of said Creek nation for damages and losses of every kind growing out of the late rebellion and all expenditures by the United States of annuities in clothing and feeding refugee and destitute Indians since the diversion of annuities for that purpose consequent upon the late war with the so-called confederate states; and the Creeks hereby ratify and confirm all such diversions of annunities heretofore made from the funds of the Creek nation by the United States, and the United States agree that no annunities shall be diverted from the objects for which they were originally devoted by treaty stipulations with the Creeks, to the use of refugee and destitute Indians other than the Creeks or members of the Creek nation after the close of the present fiscal year, June thirtieth, eighteen hundred and sixty-six.

Article XII. The United States reaffirms and reassumes all obligations of treaty stipulations with the Creek nation entered into before the treaty of said Creek nation with

the so-called confederate states, July tenth, eighteen hundrd and sixty-one, not inconsistent herewith; and further agrees to renew all payments of annuities accruing by force of said treaty stipulations from and after the close [fol. 98] of the present fiscal year, June thirtieth, eighteen hundred and sixty-six, except as is provided in article eleventh.

Article XIII. A quantity of land not exceeding one hundred and sixty acres, to be selected according to legal subdivisions, in one body, and to include their improvements, is hereby granted to every religious society or denomination which has erected, or which with the consent of the Indians, may hereafter erect buildings within the Creek country for missionary or educational purposes; but no land thus granted nor the buildings which have been or may be erected thereon shall ever be sold or otherwise disposed of, except with the consent and approval of the Secretary of the Interior; and whenever any such lands or buildings shall be so sold or disposed of, the proceeds thereof shall be applied, under the direction of the Secretary of the Interior, to the support and maintenance of other similar establishments for the benefit of the Creeks and such other persons as may be or may hereafter become members of the tribe according to its laws, customs, and usages; and if at any time said improvements shall be abandoned for one year for missionary or educational purposes, all the rights herein granted for missionary and educational purposes shall revert to the said Creek nation.

Article XIV. It is further agreed that all treaties heretofore entered into between the United States and the Creek nation which are inconsistent with any of the articles [fol. 99] or provisions of this treaty shall be, and are hereby rescinded and annulled; and it is further agreed that ten thousand dollars shall be paid by the United States, or so much thereof as may be necessary, to pay the expenses incurred in negotiating the foregoing treaty.

In testimony whereof, we, the commissioners representing the United States and the delegates representing the Creek nation, have hereunto set our hands and seals at the place and on the day and year above written.

(The names of the signers of the treaty are omitted.)

Now, therefore, be it known that I, Andrew Johnson, President of the United States of America, do, in pursuance of the advice and consent of the Senate, as expressed in its resolution of the nineteenth of July, one thousand eight hundred and sixty-six, accept, ratify, and confirm the said treaty with the amendments as aforesaid.

In testimony whereof, I have hereto signed my name and caused the seal of the United States to be affixed.

Done at the city of Washington this eleventh day of August, in the year of our Lord one thousand eight hundred and sixty-six, and of the Independence of the United States of America the ninety-first.

Andrew Johnson.

By the President: Henry Stanbery, Acting Secretary of State.

[fol. 100] Defendant introduced in evidence the Treaty between the Creek Indians and the United States of January 19, 1889, 25 Stats. 757, the material parts of which are as follows (CM 253-262):

Chap. 317.—An Act to ratify and confirm an agreement with the Muscogee (or Creek) Nation of Indians in the Indian Territory, and for other purposes.

Whereas it is provided by section eight of the act of March third, eighteen hundred and eighty-five, entitled "An act making appropriations for the current and contingent expenses of the Indian Department, and for fulfilling treaty stipulations with various Indian tribes, for the year ending June thirtieth, eighteen hundred and eighty-six, and for other purposes", "that the President is hereby authorized to open negotiations with the Creeks, Seminoles, and Cherokees for the purpose of opening to settlement under the homestead laws the unassigned lands in said Indian Territory ceded by them respectively, to the United States by the several treaties of August eleventh, eighteen hundred and sixty-six. March twenty-first, eighteen hundred and sixty-six, and July nineteenth, eighteen hundred and sixty-six; and for that purpose the sum of five thousand dollars, or so much thereof as may be necessary, be, and the same is hereby, appropriated, out of any money in the Treasury not otherwise appropriated; his action hereunder to be reported to Congress; and

Whereas William F. Vilas, Secretary of the Interior, by and under direction of the President of the United [fol. 101] States, on the part of the United States, and the Muscogee (or Creek) Nation of Indians, represented by Pleasant Porter, David M. Hodge, and Esparhecher, delegates and representatives thereto duly authorized and empowered by the principal chief and national council of the said Muscogee (or Creek) Nation, did, on the nineteenth day of January, anno Domini eighteen hundred and eighty-nine, enter into and conclude articles of cession and agreement, which said cession and agreement is in words as follows:

Articles of cession and agreement made and concluded at the city of Washington on the nineteenth day of January in the year of our Lord eighteen hundred and eighty-nine, by and between the United States of America, represented by William F. Vilas, Secretary of the Interior, by and under direction of the President of the United States, and the Muscogee (or Creek) Nation of Indians, represented by Pleasant Porter, David M. Hodge, and Esparhecher, delegates and representatives thereunto duly authorized and empowered by the principal chief and national council of the said Muscogee (or Creek) Nation.

Whereas by a treaty of cession made and concluded by and between the said parties on the fourteenth day of June, eighteen hundred and sixty-six, the said Muscogee (or Creek) Nation, in compliance with the desire of the United States to locate other Indians and freedmen thereon, ceded and conveyed to the United States, to be sold to and [fol. 102] used as homes for such other civilized Indians as the United States might choose to settle thereon, the west half of their entire domain, to be divided by a line running north and south, which should be surveyed as provided in the eighth article of the said treaty; the eastern half of the lands of the said Muscogee (or Creek) Nation to be retained by them as a home;

And whereas but a portion of said lands so ceded for such use has been sold to Indians or assigned to their use, and the United States now desire that all of said ceded lands may be entirely freed from any limitation in respect to the use and enjoyment thereof and all claims of the said Muscogee (or Creek) Nation to such lands may be surrendered and extinguished as well as all other claims of whatsoever

nature to any territory except the aforesaid eastern half of their domain;

Now, therefore, these articles of cession and agreement by and between the said contracting parties, witness:

I. That said Muscogee (or Creek) Nation, in consideration of the sum of money hereafter mentioned, hereby absolutely cedes and grants to the United States, without reservation or condition, full and complete title to the entire western half of the domain of the said Muscogee (or Creek) Nation lying west of the division line surveyed and [fol. 103] established under the said treaty of eighteen hundred and sixty-six, and also grants and releases to the United States all and every claim, estate, right, or interest of any and every description in or to any and all land and territory whatever, except so much of the said former domain of the said Muscogee (or Creek) Nation as lies east of the said line of division, surveyed and established as aforesaid, and is now held and occupied as the home of said nation.

II. In consideration whereof, and of the covenant herein otherwise contained, the United States agree to pay to the said Muscogee (or Creek) Nation the sum of two million two hundred and eighty thousand eight hundred and fifty-seven dollars and ten cents.

IV. These articles of cession and agreement shall be of no force or obligation upon either party until they shall be ratified and confirmed, first, by Act of the national council of said Muscogee (or Creek) Nation, and secondly, by the Congress of the United States, nor unless such ratification shall be on both sides made and completed before the first day of July, anno Domini eighteen hundred and eighty-nine.

Whereas the Muscogee (or Creek) Nation of Indians has accepted, ratified, and confirmed said articles of cession and agreement by act of its national council, approved by the principal chief of said nation on the thirty-first day of January, anno Domini eighteen hundred and eighty-nine, wherein it is provided that the grant and cession of land [fol. 104] and territory therein made shall take effect when the same shall be ratified and confirmed by the Congress of the United States of America, Therefore,

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That said articles of cession and agreement are hereby accepted, ratified, and confirmed.

Sec. 2. That the lands acquired by the United States under said agreement shall be a part of the public domain, but they shall only be disposed of in accordance with the laws regulating homestead entries, and to the persons qualified to make such homestead entries, not exceeding one hundred and sixty acres to one qualified claimant. And the provisions of section twenty-three hundred and one of the Revised Statutes of the United States shall not apply to any lands acquired under said agreement. Any person who ma[illegible] enter upon any part of said lands in said agreement mentioned prior to the time that the same are opened to settlement by act of Congress shall not be permitted to occupy or to make entry of such lands or lay any claim thereto.

Sec. 3. That for the purpose of carrying out the terms of said articles of cession and agreement the sum of two million two hundred and eighty thousand eight hundred and fifty-seven dollars and ten cents is hereby appropriated.

[fol. 105] Sec. 4. That the Secretary of the Treasury is hereby authorized and directed to pay out of the appropriation hereby made, the sum of two hundred and eighty thousand eight hundred and fifty-seven dollars and ten cents to the national treasurer of said Muscogee (or Creek) Nation, or to such person as shall be duly authorized to receive the same, at such time and in such sums as shall be directed and required by the national council of said nation, and the Secretary of the Treasury is hereby further authorized and directed to place the remaining sum of two million dollars in the Treasury of the United States to the credit of said Muscogee (or Creek) Nation of Indians, to be held for, and as provided in said articles of cession and agreement, and to bear interest at the rate of five per centum per annum, from and after the first day of July, anno Domini eighteen hundred and eighty-nine; said interest to be paid to the treasurer of said nation annually. Approved March 1, 1889.

[fol. 106] Defendant introduced in evidence a certified copy of the Report from the Committee on the Judiciary of the House of Representatives, dated April 24, 1912, upon a bill to legalize certain conveyances theretofore made by the Union Pacific Railroad Company. The Report is as follows (CM 356-380):

House of Representatives, 62d Congress, 2d Session

Report No. 593

Legalizing Conveyances Made by Union Pacific Railway Co.

April 24, 1912—Referred to the House Calendar and Ordered to be Printed

Mr. Norris, from the Committee on the Judiciary, submitted the following Report (to accompany H. R. 16689):

The Committee on the Judiciary, to which was referred the bill (H. R. 16689) to legalize certain conveyances heretofore made by the Union Pacific Railroad Co. and its successors, having considered the same, report thereon with the recommendation that it pass with the following amendments:

First. Page 1, line 3, after the word "by", insert the following: "And all rights acquired by adverse possession against."

Second. Page 1, line 3, after the amendment just suggested, the word "the" before "Union" should begin with a capital letter.

[fol. 107] Third. Page 1, line 4, after the word "or", strike out the word "by".

Fourth. Page 1, line 5, the word "the" preceding the word "Union", should begin with a capital letter.

Fifth. Page 2, add a new section, as follows:

Sec. 2. That all conveyances, agreements, or acts heretofore made or done by, and all rights acquired by adverse possession against The Union Pacific Railroad Company, or the Union Pacific Railway Company, or The Denver Pacific Railway and Telegraph Company, or the successors or assigns of any of them, conveying any land forming a part of the right of way between Denver, Colorado, and

Cheyenne, Wyoming, of or by any of said companies under any act of Congress or defining the limits of said right of way or restricting the same, are hereby legalized, validated, and confirmed: Provided, That said conveyances, agreements, or acts shall not have the effect to diminish said right of way to a less width than fifty feet on each side of the center of said railroad as now established and maintained.

The necessity for this legislation is brought about on account of a dispute that has arisen within the last few years regarding the width of the right of way of the Unio Pacific Railroad Co. While the bill as introduced is general in its terms, the controversy exists principally along the said line of said railroad in the State of Nebraska and in Colorado on the line of said road running from Denver to Cheyenne. The railroad company claims that its right [fol. 108] of way is 400 feet wide, while the abutting owners in the State of Nebraska claim that the right of way through that State is only 200 feet wide, and as far as the controversy in that State is concerned it is this 100 feet on each side of the right of way that is in dispute. In the line running from Denver to Cheyenne, particularly where the road passes through the city of Greeley and some other towns and villages, while the railroad company is claiming a width of 400 feet for its right of way, the abutting property owners claim that said right of way is only 100 feet wide.

In order to understand the situation, it is necessary to review briefly, some of the history of congressional legislation as it applies to this railroad. The first legislation on the subject was an act of Congress, passed in 1862, providing for the organization of the Union Pacific Railroad. This act provided for the incorporation of the company and granted it certain public lands as a bonus. The act contains the following provision:

That the right of way through public lands be, and the same is hereby granted to the said company for the construction of said railroad to the extent of two hundred feet in width on each side of said railroad where it may pass over public lands, including all necessary grounds for stations, buildings, workshops, depots, machine shops, switches, sidetracks, turntables, and water stations.

[fol. 109] Other parts of the act made various provisions for the filing of maps, etc., and for the definite location of the railroad, and contained provisions as to the time of commencing the construction of the road. The act was formally accepted by the company and the terms agreed to, but nothing was actually done by the company toward the construction of such road until after the passage of the act of 1864.

In 1864 Congress passed another act amending the act of 1862. The amendatory act, among other things, doubled the amount of land given the company as a bonus. The odd-numbered sections of land along said right of way were granted to the company. The even-numbered sections still remained public land and subject to entry under the various laws of the United States. Whatever was done by the railroad company in the way of accepting the provisions of the act of Congress, filing the maps of location, etc., was done after the passage of the act of 1864. The said amendatory act of 1864 contained, among other things, the following provisions:

And be it further enacted, That the Union Pacific Railroad Company and all other companies provided for in this act and the act of which this is amendatory be, and are hereby empowered to enter upon, purchase, take, and hold any land or premises that may be necessary and proper for the construction and working of said railroad, not ex-
[fol. 110] ceeding in width one hundred feet on each side of its center line unless a greater width be required for the purpose of excavation or embankments, and also any land or premises that may be necessary and proper for turnouts, standing places for cars, depots, station houses, or any other structures required in the construction and operation of the said road.

There is no doubt that upon a fair examination of the evidence and consideration of all the facts surrounding and relating to the building of this road and the settlement of the country adjoining it, and that for more than 40 years both the railroad company and the settlers along its line have acted upon the theory that the amendatory act of 1864 fixed the width of the right of way at 200 feet instead of 400 feet, and that the right of way was limited and fixed by the act of 1864, rather than by the act of 1862.

At the time of the passage of these acts, the land in Nebraska, over which this railroad was surveyed was almost without exception, Government land. After the railroad was built, however, the settlers took up the even-numbered sections under the homestead and preemption laws, and made settlements thereon, and in due time patents were issued by the Government to such settlers for such lands. The patents so issued by the Government to the settlers upon the even-numbered sections through which the railroad had been built, contained no reserva- [fol. 111] tion of the right of way and made no reference whatever, to the existence of said right of way over and across such lands, and so far as anything appears on the face of said patents, there is no reservation by the Government whatever, of any right of way. It is not claimed by any of the owners of these lands, that by virtue of such patents they acquired any title whatever to the right of way of the railroad.

It is admitted that notwithstanding the absence of any such reservation, the settlers acquired no title whatever, to any land properly included within the railroad right of way, and this fact is mentioned only for the purpose of showing that as far as the Government was concerned, in the issuing of its patents, it conveyed no notice whatever, to the settlers of the existence of a right of way 400 feet wide. The odd-numbered sections given as a bonus to the railroad company, were sold and conveyed to settlers, and with very few exceptions in the State of Nebraska, when the railroad company made such sale and issued either a contract for a deed or a deed to the land, a reservation was made of only 100 feet on each side of the center of the railroad. On the theory that the railroad right of way was 200 feet instead of 400, fences were built along such line both by the railroad company and by the settlers. The settlers who took up the even-numbered sections under the homestead and preemption laws, cultivated their land up to within 100 feet on each side of the railroad. There seemed [fol. 112] to be no dispute and no misunderstanding and this condition of things continued for about 40 years. As soon as the railroad company constructed its line of road, it laid out towns all along its line, on the odd-numbered sections which it owned and which had been deeded to it by the Government under the acts of Congress heretofore referred to. In laying out these towns, they were without

exception, laid out on the theory that the right of way of the railroad company was 200 feet instead of 400 feet. Upon this 100 feet which has since come into dispute, improvements were made and streets were laid out.

As a rule, in most of these new towns, the principal street ran parallel with the railroad and was improved by the usual improvements and buildings that would be constructed in growing villages and cities. Some of these towns have grown to be cities. In the city of Grand Island, Nebr., this street, known as Front Street, is located entirely on this 100-foot strip of disputed territory. It has for quite a number of years been a paved street and been so maintained by the city. For quite a number of blocks, the street is built up with modern buildings and occupied by business houses of various kinds. If this 100 feet were now taken by the railroad company as a part of its right of way it would leave all these buildings without any means of access except through an alley in the rear. All along the line of the railroad throughout this State, various kinds of improvements have been made. In the country, the land [fol. 113] for the most part is in a high state of cultivation and is worth from $75 to $150 an acre. Where the railroad company, on its odd-numbered sections, sold its land either to farmers or to purchasers of town lots, it has received pay for this 100-foot strip that is in dispute on each side of the line of the right of way. Where the even-numbered sections were taken by settlers and title acquired from the Government these settlers, in most instances, paid to the Government of the United States the sum of $2.50 per acre for all this disputed tract.

Until within a few years ago, no one had questioned the legality of the title of the individual proper- owners along the right of way. For 40 years lands in the country and lots in the villages and cities had been improved and transferred in the usual course of business, and taxes have been paid upon this disputed strip by such owners, on the theory that they had a perfect title. Within the last two years, however, the railroad company, both in Colorado and in Nebraska, have begun to assert their title and their right to the possession of the entire 400-foot strip, claiming that their title and right of possession is derived from the act of 1862, which fixed the right of way at 400 feet. Various

actions have been commenced in both States, to acquire possession of the disputed strip, and are now pending both in the State and United States courts. An examination of the authorities and the decisions of the Supreme Court will [fol. 114] I think lead to the conclusion that unless some legislation similar to that intended by this bill is enacted by Congress the railroad company will be successful in these suits and the titles of the property owners to this disputed strip will be annulled and set aside. In many instances, in cities and towns, it will mean the financial ruin of many people whose accumulations of nearly a lifetime will be lost, and all this will be brought about without any possible good or benefit to the railroad company.

The question was first directly passed upon by the Supreme Court of the United States in the case of the Northern Pacific Railway Co. v. Townsend (190 U. S. Repts. p. 267). The case arose under a statute, enacted by Congress, authorizing the construction of the Northern Pacific Railroad Co. It provided that the right of way of the railroad should be 400 feet. The defendant Townsend claimed a portion of the 400 feet by adverse possession, and if the title of the railroad company was such that title to any of its right of way could have been acquired by adverse possession, or could have been deeded away directly by the railroad company, then Townsend had acquired a perfect title. The Supreme Court, however, speaking through Mr. Justice White, now Chief Justice, held that the title of the railroad company to this right of way granted by the act of Congress was such that it had no right to dispose of any of said right of way; that it could not give a valid title and had no authority to convey to any person, any part of [fol. 115] said right of way, and that therefore no title against the railroad company to any portion of its right of way could be acquired by adverse possession. In passing on this case Mr. Justice White, representing the majority of the court, used the following language:

Manifestly, the land forming the right of way was not granted with the intent that it might be absolutely disposed of at the volition of the company. On the contrary, the grant was explicitly stated to be for a designated purpose, one which negated the existence of the power to voluntarily alienate the right of way or any portion thereof. The substantial consideration inducing the grant was the

perpetual use of the land for the legitimate purpose of the railroad, just as though the land had been conveyed in terms to have and to hold the same so long as it was used for the railroad right of way. In effect the grant was of a limited fee, made on an implied condition of reverter in the event that the company ceased to use or retain the land for the purpose for which it was granted. This being the nature of the title to the land granted for the special purpose named, it is evident that to give such efficacy to a statute of limitations of a State as would operate to confer a permanent right of possession to any portion thereof upon an individual for his private use would be to allow that to be done by indirection which could not be done [fol. 116] directly, for, as said in Grand Trunk Railroad v. Richardson (91 U. S., 454, 468), "a railroad company is not at liberty to alienate any part of its roadway so as to interfere with the full exercise of the franchises granted." Nor can it be rightfully contended that the portion of the right of way appropriated was not necessary for the execution of the powers conferred by Congress, for, as said in Northern Pacific Railroad Co. v. Smith (171 U. S. 275), speaking of the very grant under consideration: "By granting a right of way 400 feet in width, Congress must be understood to have conclusively determined that a strip of that width was necessary for a public work of such importance." Neither courts nor juries, therefore, nor the general public, may be permitted to conjecture that a portion of such right of way is no longer needed for the use of the railroad and title to it has vested in whomsoever chooses to occupy the same. The whole of the granted right of way must be presumed to be necessary for the purposes of the railroad, as against a claim by an individual of an exclusive right of possession for private purposes.

To repeat, the right of way was given in order that the obligations to the United States assumed in the acceptance of the act might be performed. Congress having plainly manifested its intention that the title to and possession of the right of way should continue in the original grantee, [fol. 117] its successors and assigns, so long as the railroad was maintained, the possession by individuals of portions of the right of way can not be treated without overthrowing the act of Congress as forming the basis of an adverse

possession which may ripen into a title good as against the railroad company.

The question at once presents itself: What will be the legal effect if we pass the proposed bill? There can be no question but what the enactment of this proposed legislation will give entire relief and will have the effect of validating conveyances made by the railroad company, within the limits specified in the bill.

This will be true whether such conveyances were made directly by deed from the railroad company, or whether title against the railroad company was acquired by adverse possession under the law of the State where the land is situated. A condition exactly similar to this existed in the case of the Northern Pacific Railway Co. v. Ely et al. (197 U. S. Repts., p. 1). This action was one to quiet title, brought by the Northern Pacific Railway Co., against various persons claiming ownership. The defendants in that case had acquired their land through patents issued by the United States, under the preemption and homestead laws, and had been in quiet, peaceful, undisturbed, and undisputed possession thereof for more than 10 years prior to the commencement of the action, and were claiming title by adverse possession under the laws of the State of Wash-
[fol. 118] ington.

It was admitted by the defendants in the case that the act of Congress of 1864 gave to the railroad company a right of way of 400 feet in width, and the only question involved was whether it was possible for private parties to obtain title to a portion of this right of way by adverse possession. The Supreme Court of the State of Washington held in that case that the statute of limitations did run against the railroad company and that the title acquired by the defendants had become absolute. Shortly after this, the Supreme Court of the United States rendered the decision in the case of the Northern Pacific Railway Company v. Townsend, holding, as we have heretofore seen, that title could not be thus acquired by adverse possession to any portion of the right of way, and within a month after the Supreme Court had rendered this decision in the Townsend case, the railway company, by writ of error, took the Ely case into the Supreme Court of the United States, and the same was docketed there on the 23rd day of July, 1903.

While this case was pending in the Supreme Court of the United States, Congress passed the act of April 28, 1904, for the express purpose of remedying the wrong that would have necessarily come about by an affirmance of the Ely case, and which it was apparent, would necessarily have to be done if the Supreme Court followed their decision in the Townsend case. Section 1 of the act of April 28, 1904, is practically the same as section 1 of the bill now under [fol. 119] consideration. That section reads as follows:

That all conveyances heretofore made by the Northern Pacific Railroad Company or by the Northern Pacific Railway Company of land forming a part of the right of way of the Northern Pacific Railroad, granted by the Government by an act of Congress, are hereby legalized, validated, and confirmed: Provided, That no such conveyance shall have effect to diminish said right of way to a less width than one hundred feet on each side of the center of the main track of the railroad as now established and maintained.

It will be noticed that the remedial legislation in that case was passed while the question was pending in the courts. The facts in that case were very nearly identical with the facts in this case. The legislation in that case was practically identical with the bill in this case. It will be seen, therefore, that the decision in Northern Pacific Railway Company v. Ely was upon a state of facts and a condition of law which would be practically identical with existing conditions if the present bill were enacted into law. It is important to note, therefore, that in the Ely case the Supreme Court of the United States, while still adhering to its decision in the Townsend case, gave full effect to the remedial legislation provided in the act of April 28, 1904, above quoted. The decision was rendered on the 20th day of February, 1905, and the first paragraph [fol. 120] of the syllabus reads as follows:

Northern Pacific Railway Company v. Townsend (190 U. S., 267) affirmed as to that point individuals can not for private purposes acquire by adverse possession under a State statute of limitations any portion of the right of way granted to the Northern Pacific Railway Co. But by the act of April 28, 1904, that right of way was narrowed to

200 feet in width and the title acquired to land outside of a strip of that width was confirmed.

Further on in the opinion, the court uses the following language:

The act of April 28, 1904, in view of our decision in that case (Townsend case) was obviously intended to and did have the effect to narrow the right of way to 200 feet in width, so far, at least, as outside of that strip the original right of way had been parted with.

After reviewing the authorities on the question of adverse possession the court sums up the argument as follows:

"Adverse possession, therefore, may be said to transfer the title as effectually as a conveyance from the owner; it may be considered as tantamount to a conveyance."

So far as title to portions of the right of way could be lawfully acquired from the railway company, defendants below, appellees in the Supreme Court, had acquired title to their parcels by adverse possession and occupied the [fol. 121] same position as if they had received conveyances, which the act of April 28, 1904, operated to confirm. The act is remedial and to be construed accordingly.

There can be no doubt, therefore, that the passage of this bill would have the effect of validating and confirming all the titles within the 400 strip; but outside of the 200 strip, that have been acquired both by direct deed from the railroad company in the case of the odd-numbered sections and by adverse possession in the case of the even-numbered sections, where the settlers have obtained title by patent from the United States.

The Colorado situation presents even greater equities in favor of this legislation than is presented by the facts relating to the controversy in Nebraska. The roadbed from Denver, Colo., to Cheyenne, Wyo., was originally graded and built by a local company, known as the Denver Pacific Railway & Telegraph Co. This was done during the years 1868 and 1869. By the act of Congress approved March 3, 1869, a connection was provided for this company and the Union Pacific Railway Co., and land subsidies were given

to the Denver Co. along the line between Denver and Cheyenne, as provided by prior acts of Congress.

Under this act, and after its approval, an agreement was entered into whereby the line from Denver to Cheyenne was built over the roadbed which had been graded in 1868 [fol. 122] and 1869. In 1870, Horace Greeley organized the Union Colony under the laws of Colorado, and acting on behalf of said colony, Mr. Greeley purchased a large amount of land and laid out the town of Greeley, in Colorado. This was on the line of the railroad running from Denver to Cheyenne. The title to the land upon which Greeley is situated, with the exception of one 40-acre tract, had been acquired from persons who had taken the same under the preemption laws of the United States. These entries were all filed prior to the building of this railroad and prior to the passage of the act of 1869. There was a dispute between the Union Land Co., represented by Horace Greeley, and the railroad company, as to the width of the right of way of the railroad company through the town of Greeley. After some negotiations between the officials of the road and the colony company an agreement was reached satisfactory to both parties. This agreement was incorporated in a deed of conveyance from the colony company to the railway company. The deed was dated on the 21st day of October, 1870, and was delivered by the colony company to the railroad company, and on the 1st day of November, 1870, the railroad company placed the deed on record. This deed is as follows:

Union Colony Right of Way Deed

Right of Way from Union Colony of Colorado to Denver Pacific Railway & Telegraph Co. Filed for Record at 11 o'clock November 1, 1870. W. J. Kram, Recorder

[fol. 123] Whereas the line or tract of the Denver Pacific Railway & Telegraph Co. runs through the lands of the Union Colony of Colorado and within the town plat of Greeley, Weld County, Colorado Territory, and an agreement has been made between the said Union Colony of Colorado and the Denver Pacific Railway & Telegraph Co. by which the said Union Colony of Colorado has agreed to grant to the Denver Pacific Railway & Telegraph Co.,

being the owner of said lands, a right of way in and over the same.

Now, therefore, know all men by these presents: That the said Union Colony of Colorado, in pursuance of the said agreement and in consideration of the sum of $1. paid to the said Union Colony of Colorado, do hereby give, grant, sell, and convey unto the said Denver Pacific Railway & Telegraph Co. a right of way of 50 feet on each side from the center of the line or track of said Denver Pacific Railway & Telegraph Co., in and over and running through said town plat of Greeley aforesaid on the east side thereof and along the said line of said railway, the said strip of land or right of way being of the width of 100 feet, and commencing at the southeast corner of said town plat of Greeley and running north through the following blocks: 101, 100, 82, 79, 62, 39, 22, 19 and 21 as platted and recorded in the office of the clerk of Weld County, and the said right of way shall be forever of the said dimensions. Also the said Union Colony of Colorado does hereby give, grant, sell, and convey unto the said Denver Pacific Railway & [fol. 124] Telegraph Co., a right of way of 200 feet along the line or track of the said Denver Pacific Railway & Telegraph Co. and within the blocks Nos. 42 and 59, in the town of Greeley, as platted and recorded in the office of the recorder of Weld County, said right of way commencing at the corner of the line or track of the said Denver Pacific Railway & Telegraph Co. and extending 150 feet to the east side and 50 feet to the west side thereof. The said Union Colony of Colorado agrees to lay out and construct along and east of said right of way a street 66 feet wide running north and south and within the blocks Nos. 42 and 59 aforesaid, and the said right of way shall be forever of the said dimensions.

In further consideration it is expressly agreed between the parties hereto that the said Denver Pacific Railway & Telegraph Co. shall erect within three months from the date of this instrument a good and substantial building for a freight and passenger depot at or near the point of said right of way where the said railway crosses Main Street, in the town of Greeley aforesaid, being on the north side of and along said Main Street.

It is also agreed in further consideration between the parties aforesaid that the said Denver Pacific Railway &

Telegraph Co. shall have for its use and benefit only the said right of way without any right or powers to give, grant, sell, convey, or rent the same. It is also agreed that intoxicating liquors shall never be manufactured, sold, or [fol. 125] given away in or upon said premises herein conveyed with the knowledge or consent of said Denver Pacific Railway & Telegraph Co., and in case any one of these conditions shall be violated this conveyance and everything herein contained shall be null and void.

To have and to hold the said easements and privileges to the said Denver Pacific Railway & Telegraph Co. forever as appurtenances to the said railway as above described.

In witness whereof the party of the first part has affixed its corporate seal and caused the same to be signed by N. C. Meeker, its agent and attorney in fact, this 21st day of October, A. D. 1870.

N. C. Meeker, President. (Corporate Seal.)

Signed and sealed in presence of F. M. Babcock.

(United States revenue stamp, 50 cents.)

Territory of Colorado,
Weld County, ss:

I, Frank M. Babcock, do hereby certify that on the 21st day of October, A. D. 1870, N. C. Meeker, President and attorney in fact for the Union Colony of Colorado, came before me, a notary public in the county aforesaid, and personally acknowledged that he had executed the within conveyance, and that I know the said N. C. Meeker to be the same person who executed the said conveyance.

[fol. 126] Given under my hand and notarial seal the day and year last above written.

Frank M. Babcock, Notary Public for Weld County.
(Notarial Seal.)

It will be observed that this deed provides for a right of way through the town of Greeley of 100 feet in width, and no more, except in blocks 42 and 59, through which blocks the right of way was 200 feet in width. In accordance with the provisions contained in the deed the colony company laid out and constructed the street provided for in said deed, and replatted its town, so as to correspond with the

necessary changes made, and the railroad company immediately constructed its depot and, except in the business centers, fenced its right of way through the town, placing the fence on each side of the railroad 50 feet from the center thereof. The town of Greeley has grown to be a city of about 10,000 people. The Union Colony Co., as soon as the deed had been recorded and the streets rearranged in accordance therewith, began the sale of lots on each side of said railroad, and parties to whom said sales were made took possession of the property and began the erection of improvements thereon. Some of said improvements are of very great value and consist in warehouses, mills and factories, all of a permanent character. The owners of this property have ever since 1870, continued to exercise undisputed possession and ownership of said [fol. 127] property, without any objection on the part of the railway company or any other person. They have paid all the taxes thereon, both general and special, assessed against said lots. Many of these lots have been frequently sold and conveyed and deeds of general warranty given. Many of them have been sold from 8 to 10 times and some of them as many as 25 times. Many of them have been mortgaged.

In the aggregate, there have been more than 1000 deeds of conveyance placed on record from various persons to the property abutting on this right of way within the limits of the city of Greeley. In the year 1909 the railroad company claimed to be the owner of a right of way 400 feet in width, throughout the entire length of the city, claiming that the same was granted to the company by the act of Congress before referred to. In many cases, mills and factories have been built on the disputed land and mortgaged. As soon as the question of title was placed in doubt by the action of the railway company, it was impossible to renew mortgages or to make sales of property. On this disputed tract, there is one mill that the evidence shows is worth more than $100,000. On some of the property, foreclosures of mortgages have been commenced because the owners are absolutely unable to renew loans or negotiate new ones. In December, 1909, the railroad company filed its bill of complaint against various defendants to quiet title in that company to a strip of land 400 feet wide, extending through the city of Greeley a distance of 2.2

[fol. 128] miles, and this case is now pending in the United States courts. An appeal to the circuit court of appeals of the eighth district was tried on June 21, 1911, the opinion being found in 189 Fed., page 1.

Each of the judges upon deciding this case, rendered a separate opinion. One judge held that in so far as any portion of the railroad company's 400-foot strip had been appropriated either by the city of Greeley for streets or alleys or by other railroad companies for the location of their lines, the Union Pacific Co. was precluded from recovering the land so appropriated, but that it was entitled to recover from all private owners who owned property within the disputed strip. Another one of the judges held that the Union Pacific Co. had no title to any land outside of the 100-foot right of way and was bound by the deed heretofore set out. The other judge held flatly that the Union Pacific Railway Co. was entitled to a right of way of 400 feet; that under the case of the Northern Pacific Railway Co. v. Townsend it was not bound by its deed or its agreement and no title could be acquired against it by adverse possession. The reasoning of the majority of this court therefore seems to be that at least as far as private individuals in Greeley are concerned, their titles to this disputed strip derived from the Union Colony Co. are invalid and that they are trespassers upon the right of way of the railroad company. This case has been taken on appeal to the Supreme Court of the United States and is [fol. 129] now pending therein.

Conditions similar to those at Greeley prevail at other places along the line between Denver and Cheyenne. In the town of Brighton, located on said railroad, there have been several suits commenced to recover lots within the 400-foot strip, where the lots have been in the possession of private parties for more than 40 years. In this town, there are several stores and warehouses and one hotel involved in the controversy. In this particular town the right of way was fixed in 1870, by agreement, at 75 feet on each side of the center of the track. Similar conditions exist in the country along this line of road to the conditions in the State of Nebraska.

It seems plain that these conditions demand relief at the hands of Congress, similar to that given the property owners in the Northern Pacific case. The equities are all

against the railroad company. It ought not to be allowed, after a period of 40 years, to violate its solemn obligations or to deprive men of property and property rights which they have honestly and fairly acquired. The bill, if passed, will not take from the railroad company one foot of land that it has not by its own act either directly or indirectly deeded away. The proposed legislation only gives validity to acts that the railroad company has heretofore done. It would only prevent it from refusing to be bound by its own action. There can be no successful claim made that the railroad company needs a right of way 400 feet in width. [fol. 130] It is a wider strip than is allowed under the statutes of any State in the Union. It is impossible to conceive that the time will ever come when the railroad company will need this much of a right of way. It has never used it in the past. It is not pretending to use it for railroad purposes now. Under its charter, it cannot use it for anything except for railroad purposes. At the hearing, the attorney representing the railroad company claimed that they would be able to use this 400-foot strip through the country for the purpose of plowing fire guards thereon and that they ought to be permitted to retain it all so as to have sufficient right of way upon which to build additional tracks, if the business should ever develop sufficiently to warrant it.

No one can conceive that the time will ever come when this railroad will need 400 feet upon which to build additional tracks for the transaction of its business and it is hardly reasonable to believe that the railroad company wants or that it ought to have this wide strip of territory simply for the purpose of plowing fireguards. At least, it could not expect to plow fireguards through the cities and towns where the claim is being made for a 400-foot right of way. Wherever it has maintained its right of way and used it, this bill will not interfere with such usage. No one can claim that the railroad company would in any way be injured by this legislation. It cannot possibly use the land. This wide strip would be of no possible benefit to [fol. 131] it. It could not dispose of it. It could not use it for manufacturing purposes, but under its charter, would be compelled to use it entirely for railroad purposes. It can not, therefore, be injured by the legislation. The lack of the legislation, however, is injuring thousands of people

and divesting them of many years of their labor. Neither is it any answer for the railroad company to say that in exceptional cases it does not intend to commence action against property owners. The very fact that the title is not valid interferes with business and destroys the value of the property. By no act of the railroad company can the title be made valid. It will take an act of Congress to do this. It is believed the bill in question will accomplish this purpose. Its effect will simply be to validate the acts of the railroad company and to give legal effect to the action heretofore taken by the railroad company.

[fol. 132] Defendant introduced in evidence a certified copy of the Report from the Committee on Public Lands to the House of Representatives, dated March 28, 1916, upon a bill granting a patent to a certain strip of land to Elisha A. Crandall. The report is as follows (CM 383-386):

House of Representatives, 64th Congress, 1st Session

Report No. 444

Granting Patent to a Certain Strip of Land to Elisha A. Crandall

March 28, 1916—Committed to the Committee of the Whole House and Ordered to be Printed

Mr. Smith of Idaho, from the Committee on Public Lands, submitted the following report (to accompany H. R. 7419):

The Committee on Public Lands, to whom was referred the bill (H. R. 7419) granting a patent to a certain strip of land to Elisha A. Crandall, having carefully considered the same, report herewith, and recommend that the bill do pass.

The purpose of the bill is to confirm title to Elisha A. Crandall, to whim was issued a patent October 16, 1903, a portion of which embraced land formerly granted as a right of way to the Northern Pacific Railroad Co. (now Railway Co.), but which has since been abandoned by said corporation. The report of the Secretary of the Interior, [fol. 133] hereto attached, more fully explains the merits of the proposed legislation.

Department of the Interior

Washington, March 4, 1916.

Hon. Scott Ferris,
Chairman Committee on Public Lands,
House of Representatives.

My Dear Mr. Ferris: In response to your request therefor, I have the honor to report on H. R. 7419 as follows:

The bill proposes to direct the Secretary of the Interior to issue a patent to Elisha A. Crandall for a strip of land formerly occupied by the Northern Pacific Railway Co. as a right of way, embraced within the homestead entry of Crandall, covering the E-½ SW.¼ and lots 6 and 7, sec. 6, T. 56 N., R 2 E., Boise meridian, Idaho, which strip of land has been abandoned by the said railway company.

This bill is the same as H. R. 21476, introduced in the Sixty-third Congress, third session, upon which no report was made owing to the adjournment of Congress March 4, 1915, before the same was completed.

The act of Congress approved July 2, 1844 (13 Stat., 365), made a grant to the Northern Pacific Railroad (now Railway) Co. of a right of way over the public lands to the extent of 400 feet in width along and upon such line as the company might adopt. Crandall made his entry January 27, 1899, and patent was issued to him October 16, 1903. He was charged with and received patent for the entire [fol. 134] acreage covered by the subdivisions described in his entry, notwithstanding that it appears that a part thereof had been granted to the railway company for right of way purposes. This was in accordance with the practice which has prevailed in this department for many years, under the belief that whatever reversionary interest the United States might have in the land granted to the railway company would pass to the owner under the patent issued to a subsequent entryman, in the event that such right of way should be abandoned.

In the case of Northern Pacific Railroad Co. v. Townsend (190 U. S., 367), it was held by the court in construing the above right of way:

"In effect, the grant was of a limited fee made on an implied condition of reverter, in the event that the company ceased to use or retain the land for the purpose for which it was granted."

In a letter addressed to said Elisha A. Crandall, February 13, 1915, (43 Land Decisions, p. 556), it was held by this department that the patent granted to him on October 16, 1903, conveyed no interest or estate in the lands granted to and possessed by the railway company prior to the date on which his homestead entry was initiated, and that upon the abandonment by the railway company of the right of way granted to it across the lands described in the patent which afterwards issued to him, the legal title to the lands in such right of way reverted to and became the property [fol. 135] of the United States, and must so remain until some provision of statute has been made by Congress for its disposition.

The entire subject of the disposition to be made of abandoned portions of rights of way and easements which have reverted to the United States under circumstances similiar to that in the case under consideration, not only under the acts making right of way and land grants similar to that of the Northern Pacific Railway Co., but under the general railroad right of way act of March 3, 1875 (18 Stat., 482), has this day been made the subject of such recommendation to Congress as, in the opinion of this department, is best designed to secure the title to the lands included in such abandoned rights of way and easements in the parties entitled thereto under such patents or other evidences or title as may be issued by the United States for the legal subdivisions traversed or affected thereby.

However, if Congress sees fit to enact House bill 7419, for the relief of Mr. Crandall, this department has no objection to interpose to such action.

Cordially, yours, Franklin K. Lane, Secretary.

Defendant introduced in evidence a certified copy of a Report from the Committee on Public Lands to the Senate, dated July 7, 1916, upon the House bill granting a patent to [fol. 136] a certain strip of land to Elisha A. Crandall. This is the same bill to which the House Committee Report set out on pages 132 supra relates, and the Senate Committee Report merely adopts the House Committee Report and recommends the passage of the bill (CM 387-390).

[fol. 137] Defendant introduced in evidence a certified copy of a letter, dated March 4, 1916, from Franklin K. Lane, Secretary of the Interior, to Scott Ferris, Chairman

of the Committee on Public Lands of the House of Representatives. The letter is as follows (CM 348-353):

Department of the Interior

Washington, March 4, 1916.

Hon. Scott Ferris, Chairman,
Committee on Public Lands,
House of Representatives.

My dear Mr. Ferris: By the act of Congress approved July 2, 1864, (13 Stat., 365), making a grant of lands to the Northern Pacific Railroad Company, a right of way over the public lands four hundred feet in width along and upon the line of road as constructed by the company, was also granted. By other acts making grants of land to aid in the construction of railroads, rights-of-way of varying widths were also granted, some of them not exceeding two hundred feet in width.

In the construction of these grants of rights-of-way of the courts, the estate granted was characterized as a limited fee determinable by the act of the company in abandoning the property and ceasing to use it for the purpose for which the grant was made. In the case of the Northern Pacific Railroad Company v. Townsend, (190 U. S. 267, [fol. 138] the court held:

(Stamped on bottom of 1st page:) Dept. of the Interior. Received Feb. 29, 1913. To Solicitor. Sec'y of Mails. and Files. Copy for Secretary's office. Initial here. To Secretary 2-29-16, for signature.)

"In effect the grant was of a limited fee made on an implied condition of reverter in the event that the company ceased to use or retain the land for the purpose for which it was granted."

In another place in the same opinion, in construing the effect of such right-of-way upon a patent subsequently granted to a homestead entryman, it was held:

"As the grant of the right-of-way, the filing of the map of definite location, and the construction of the railroad within the quarter-section in question, preceded the filing of the homestead entries on such section, the lands form-

ing a right-of-way were taken out of the catagory of public lands, subject to preemption and sale, and the land department was therefore without authority to convey rights therein. It follows that the homesteaders acquired no interest in the land within the right-of-way, because of the fact that the grant to them was of the full legal subdivisions."

[fol. 139] In a letter dated February 13, 1915 (43 Land Decisions, page 556), addressed to Mr. E. A. Crandall, Hope, Idaho, in construing the effect of the four-hundred-foot right-of-way granted to the Northern Pacific Railroad Company by said act of July 2, 1864, upon the title issued to Mr. Crandall by patent dated October 16, 1903, upon his homestead entry allowed for lands traversed by such right-of-way, it was held:

"That upon abandonment by the railroad company of the right-of-way granted to it across the land described in the patent which afterward issued to you, the legal title to the lands of such right-of-way, reverted to and became the property of the United States, and must so remain until some provision of statute has been made by Congress for its disposition."

By Sec. 1 of the act of March 3, 1875 (18 Stat., 482), the right of way through the public lands of the United States was granted to railroad companies organized as therein set forth, and which complied with certain designated requirements "to the extent of one hundred feet on each side of the central line of said road" and also ground adjacent to such right-of-way for station buildings, depots, machine shops, side tracks, turn-outs, and water stations, "not to exceed in amount twenty acres for each station, to [fol. 140] the extent of one station for each ten miles of its road."

By Sec. 4 of said act it is further provided that upon the approval of the map or profile of the line of any such railroad by the Secretary of the Interior, the same shall be noted on the plats in the local land office and thereafter all such lands over which the right-of-way shall pass shall be disposed of subject to such right-of-way.

It is to be noted that the grant made by said act of

March 3, 1875, is spoken of throughout as a "right-of-way." The railroad company does not assure a full and complete title to the land on which the right-of-way is located but obtains only the right to use the land for the purposes for which it is granted and no other, and may hold such possession, if it is necessary to that use, as long and only as long as the use continues. The United States conveys the fee simple title in the land over which the right-of-way is granted by patent and the patentee takes the fee, for the full area of the subdivision subject *subject* to the railroad company's right of use and possession.

The character of the grant by said act of March 3, 1875, has recently been construed by the Supreme Court of the United States in its decision dated November 1, 1915, in the case of Rio Grande Western Railway Company v. Thomas B. Stringham et al., (30 Supreme Court Reports, 5). After referring to the fact that the grant made by the act is characterized as a "right-of-way" and that the act declares that "all such lands over which such right-of-way [fol. 141] shall pass shall be disposed of subject to such right-of-way", the Court decides as follows:

"The right-of-way granted by this and similar acts is neither a mere easement, nor a fee simple absolute, but a limited fee, made on an implied condition of reverter in the event that the company ceases to use or retain the land for the purposes for which it is granted, and carries with it the incidents and remedies usually attending the fee."

Citing New Mexico v. United States Trust Company, 172 U. S. 171, 183; Northern Pacific Railroad Company v. Townsend, 190 U. S., 267, 271; United States v. Michigan, 190 U. S., 379, and Western Union Telegraph Company v. Pennsylvania Railroad Company, 195 U. S., 540, 570.

It follows, as a result of this ruling of the court, that, upon the abandonment by any railroad company of any right-of-way granted to it under said act of March 3, 1875, the legal title to the land included in such right-of-way reverts to and becomes the property of the United States and does not pass to any patentee or patentees to whom patents were issued for the full area of the subdivisions subject to the railroad company's prior right of use and possession. As determined by the Department in the Crandall case, supra, with reference to the Northern Pacific grant by act

of July 2, 1864, it must so remain until some provision of [fol. 142] statute is made by Congress for its disposition.

It is desirable, therefore, in cases where patent has been or any hereafter be issued by the United States for subdivisions of the public lands traversed or affected by a right-of-way granted to a railroad company as hereinbefore set forth, that legislation be enacted so that, in the event that any such railroad company ceases to use or retain the land for the purposes for which it was granted, such abandonment or non-user, would have the effect instantly to invest the patentee of the United States with the title to the lands covered by such right-of-way which has reverted to the United States by reason of the fact that the company no longer retains or uses the lands covered thereby for the purpose for which they were granted.

I have, therefore, prepared a bill, providing for the disposition of the abandoned portions of such rights-of-way in the manner hereinbefore suggested, a copy of which is attached hereto, and would urgently recommend the passage thereof.

Cordially yours, (Signed) Franklin K. Lane, Secretary.

[fol. 143] Defendant introduced in evidence a certified copy of the Report of the Committee on Public Lands to the House of Representatives, dated June 23, 1921, on a bill to provide for the disposition of abandoned portions of rights of way granted to railroad companies. The Report is as follows (CM 393-397):

House of Representatives, 67th Congress, 1st Session

Report No. 217

Abandoned Portions of Rights of Way Granted to Railroad Companies

June 23, 1921—Committed to the Committee of the Whole House on the State of the Union and Ordered to be Printed

Mr. Burtness, from the Committee on the Public Lands, submitted the following report (to accompany H.R. 244):

The Committee on the Public Lands, to whom was referred the bill (H.R. 244) to provide for the disposition of

abandoned portions of rights of way granted to railroad companies, report same to the House with a recommenda- [fol. 144] tion that the following amendments be agreed to and that as so amended the bill do pass:

Page 2, line 1, after the word "lands", insert the following: "except such part thereof as may be embraced in a public highway legally established within one year after the date of said decree of forfeiture or abandonment."

Page 2, line 14, change the word "or" to "of".

Page 2, line 16, strike out the period at the end of the line and insert in lieu thereof a semicolon, and add the following: "nor shall this act affect any public highway now on said right of way."

The object of this bill is to provide for disposition of lands embraced in forfeited or abandoned railroad rights of way on what was originally public lands. In some cases a right of way was granted by the Government and later forfeited, while in other cases change in the location of the railroad resulted in the abandonment of the old right of way. The act of March 3, 1875, under which most of the rights of way over public lands have been granted contains a provision for forfeiture of the grant for failure to construct the railroad within a specified time succeeding the date of the grant. Under the decision of the courts railroad companies receiving such grants take a qualified fee with an implied condition of reverter in the event the companies cease to use the lands for the purposes for which they were [fol. 145] granted. Upon abandonment or forfeiture, therefore, of any portions of such right of way the land reverts to and becomes the property of the United States.

It is, however, a fact that in making conveyances of subdivisions traversed by such rights of way the United States issues patents for the full area of the tracts or legal subdivisions, making no diminution by reason of the prior grant of the right of way.

It seemed to the committee that such abandoned or forfeited strips are of little or no value to the Government and that in case of lands in the rural communities they ought in justice to become the property of the person to whom the whole of the legal subdivision has been granted or his successor in interest. Granting such relief in reality gives him only the land covered by the original patent. The attention of the committee was called, however, to the fact that in some cases highways have been established on

abandoned rights of ways or that it might be desirable to establish highways on such as may be abandoned in the future. Recognizing the public interest in the establishment of roads, your committee safeguarded such rights by suggesting the amendments above referred to protecting not only roads now established but giving the public authorities one year's time after a decree of forfeiture or abandonment to establish a public highway upon any part of such right of way.

Where the forfeited or abandoned right of way which [fol. 146] would otherwise revert to the United States lies within the limits of a city or village, then the bill provides that title thereto shall vest in such municipality, subject of course to the same provisions as to roads applicable to rural lands.

There is attached to and made a part of this report the letter of E. C. Finney, Acting Secretary of the Interior, to the chairman of the committee, dated June 9, 1921.

Department of the Interior

Washington, June 9, 1921.

Hon. N. J. Sinnott,
Chairman Committee on the Public Lands,
House of Representatives.

My dear Mr. Sinnott: Receipt is acknowledged of your letter dated May 28, 1921, requesting a report on House bill 244, with which you submit a copy of House Report No. 851, Sixty-sixth Congress, second session, concerning House Bill 9899.

The bill submitted by you entitled "A bill to provide for the disposition of abandoned portions of rights of way granted to railroad companies" provides that where rights of way of the character referred to granted to railroad companies have ceased or shall thereafter cease to be used for [fol. 147] the purposes granted whether by forfeiture or by abandonment declared or decreed by a court of competent jurisdiction or by act of Congress, such abandoned right of way shall then go to the owner of the subdivision in which the same is located, except that in the municipalities the right of way shall go to such municipality.

This bill is similar in its object and provisions to said

H. R. 9699, Sixty-sixth Congress, second session, upon which a report was made on December 4, 1919, in which the proposed legislation was favored, but certain changes and amendments were suggested in the proposed bill. This report is embodied in said House Report No. 851 submitted by you. The proposed legislation, H. R. 244, includes the amendments suggested in said department report.

Under the prevailing decisions of the courts the railroad companies to which grants of rights of way have been made of the character under consideration take a base or qualified fee with an implied condition of reverter in the event that the companies cease to use the land for the purposes for which it is granted (Northern Pacific Railroad Co. v. Townsend, 190 U. S., 267, 271; Rio Grande Western Railroad Co. v. Stringham, 239 U. S., 44). In making conveyances of the subdivisions traversed by such rights of way, however, the United States issues patents for the full area of the tracts, no diminution of acreage being made by reason of the prior grant of the right of way. It follows as the result of the [fol. 148] rulings above cited that upon the abandonment by any railroad company of any right of way any portion of any right of way granted to it the legal title to the land included in such right of way reverts to and becomes the property of the United States and does not pass to any patentee or patentees to whom patents were issued for the full area of the subdivisions subject to the railroad company's prior right of use and possession.

The legislation proposed by this bill, therefore, would seem to be desirable, and I would recommend the enactment thereof.

The report submitted by you is herewith returned.

Respectfully, E. C. Finney, Acting Secretary.

[fol. 149] Defendant introduced in evidence a certified copy of the Report of the Committee on Public Lands to the Senate, dated January 6, 1922, upon the House bill to provide for the disposition of abandoned portions of rights of way granted to railroad companies. This is the same bill to which the House Committee Report set out at pages 143 fl. supra relates, and the Senate Committee Report merely adopts the House Committee Report and recommends the passage of the bill (CM 399-404).

[fol. 150] Defendant introduced in evidence the Act of Congress of March 8, 1922, 42 Stats. 414, which is as follows (CM 264-265):

42 Stats. 414. Chap. 94. (H.R. 244).—An Act to provide for the disposition of abandoned portions of rights of way granted to railroad companies.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That whenever public lands of the United States have been or may be granted to any railroad company for use as a right of way for its railroad or as sites for railroad structures of any kind, and use and occupancy of said lands for such purposes has ceased or shall hereafter cease, whether by forfeiture or by abandonment by said railroad company declared or decreed by a court of competent jurisdiction or by Act of Congress, then and thereupon all right, title, interest, and estate of the United States in said lands shall, except such part thereof as may be embraced in a public highway legally established within one year after the date of such decree or forfeiture or abandonment be transferred to and vested in any person, firm, or corporation, assigns, or successors in title and interest to whom or to which title of the United States may have been or may be granted, conveying or purporting to convey the whole of the legal subdivision or subdivisions traversed or occupied by such railroad or railroad structures of any kind as aforesaid, except lands within a municipality the title to which, upon forfeiture or abandonment, as herein pro-
[fol. 151] vided, shall vest in such municipality, and this by virtue of the patent thereto and without the necessity of any other or further conveyance or assurance of any kind or nature whatsoever;

Provided, that this Act shall not affect conveyances made by any railroad company or portions of its right of way if such conveyance be among those which have been or may hereafter and before such forfeiture or abandonment be validated and confirmed by any Act of Congress; nor shall this Act affect any public highway now on said right of way; Provided Further, That the transfer of such lands shall be subject to and contain reservations in favor of the United States of all oil, gas, and other minerals in the land so transferred and conveyed, with the right to prospect for, mine, and remove same.

Approved, March 8, 1922.

[fol. 152] Defendant introduced in evidence as Exhibit 12 a letter from the Commissioner of the General Land Office with correspondence and map attached. The letter, dated Nov. 12, 1928, relates to proof and approval of the construction by the Choctaw Railway Company in conformity to the applicable Acts of Congress of that part of its line extending from Oklahoma City to Ft. Reno as shown on its map of location filed July 13, 1889. The letter is as follows:

[fol. 153] EXHIBIT 12

Address only the Commissioner of the General Land Office

United States Department of the Interior

General Land Office, Washington

Nov. 12, 1928.

In reply please refer to: Guthrie 013958 "F" JKR.

Choctaw Coal & Railway Company, Choctaw, Oklahoma & Gulf Railway Company, Successors. Proof of Construction Accepted.

Messrs. Littlepage & Littlepage,
Union Trust Building,
Washington, D. C.

Gentlemen: Reference is had to your letter of November 7, 1928, wherein you transmitted to this office proof of construction of right of way granted July 13, 1889, upon the application of the Choctaw Coal & Railway Company under and pursuant to the provisions of the act of February 18, 1888 (25 Stat. 35), as amended, from a point in the east line of Sec. 33, T. 12 N., R. 3 W., to a point in the west line of Sec. 10, T. 12 N., R. 7 W., I. M., a distance of 25.16 miles.

This proof of construction has been examined and found sufficient, and the conditions governing the grant have been complied with, and the easement considered earned.

This proof of construction was filed in answer to office order of February 11, 1924, wherein evidence was also re- [fol. 154] quired as to the construction of the right of way

granted July 11, 1889, for right of way from a point in Sec. 33, T. 12 N., R. 3 W., to a point in Sec. 4, T. 11 N., R. 2 E., I. M., upon which no proof of construction has been filed.

Evidence of the construction of the last above described right of way should be filed with- the next 60 days or a relinquishment therefor.

You further request that the above described proof of construction be certified. There is no certification or other approval given by this office other than this letter, which should be filed with the duplicate copy of the proof of construction returned herewith.

The evidence of construction as now required should be filed in this office as the local office at Guthrie, Oklahoma, has been discontinued.

In the event no further action is taken by your company, appropriate action will be taken by this office without further notice.

Very respectfully, (Signed) William Spry, Commissioner.

11-10-NBL.

[fol. 155] State of Illinois,
County of Cook, ss:

I, J. E. Gorman, do hereby certify that I am the President of the Choctaw, Oklahoma and Gulf Railroad Company; that the railroad described as follows:

From a point in the east line of Section Thirty-three (33), Township Twelve (12) North, Range Three (3) West, to a point in the west line of Section Ten (10), Township Twelve (12) North, Range Seven (7) West of the Indian Meridian, in the Territory of Oklahoma, a distance of Twenty-five and sixteen hundredths (25.16) miles,

was actually constructed as set forth in the accompanying affidavit of C. A. Morse, Chief Engineer; that the location of the constructed railroad substantially conforms to the map and field notes approved by the Secretary of the Interior on the 13th day of July, 1889; and that the Company has in all things complied with the requirements of the Act of Congress of February 18th, 1888, February 13th, 1889, August 24th, 1894, April 24th, 1896 and the Act of March 28th, 1900.

Choctaw, Oklahoma and Gulf Railroad Company,
(Signed) by J. E. Gorman, President.

Attest: (Signed) Earl Nyquist, Secretary.

[fol. 156] STATE OF ILLINOIS,
County of Cook, ss:

C. A. Morse, being duly sworn, says that he is the Chief Engineer of the Choctaw, Oklahoma and Gulf Railroad Company; that said railroad has been constructed as follows:

From a point in the east line of Section Thirty-three (33), Township Twelve (12), North, Range Three (3), West, to a point in the west line of Section Ten (10), Township Twelve (12) North, Range Seven (7) West of the Indian Meridian, in the Territory of Oklahoma, a distance of Twenty-five and sixteen hundredths (25.16) miles;

that said construction was completed during the year 1890 and that the constructed railroad conforms substantially to the map and field notes which received the approval of the Secretary of the Interior on the 13th day of July, 1889.

(Signed) C. A. Morse, Chief Engineer of the Choctaw, Oklahoma and Gulf Railroad Company.

Sworn and subscribed to before me, this 18th day of October, 1928. (Signed) E. Christiansen, Notary Public. Commission expires Aug. 23, 1930.

[fol. 157] That part of the map attached to Exhibit 12 showing the line of the road across the land involved in these cases follows this page. The solid line is the original location of the road as set out on the map of location filed with the Secretary of the Interior on July 13, 1889, and the dotted line is the location of the road as actually constructed.

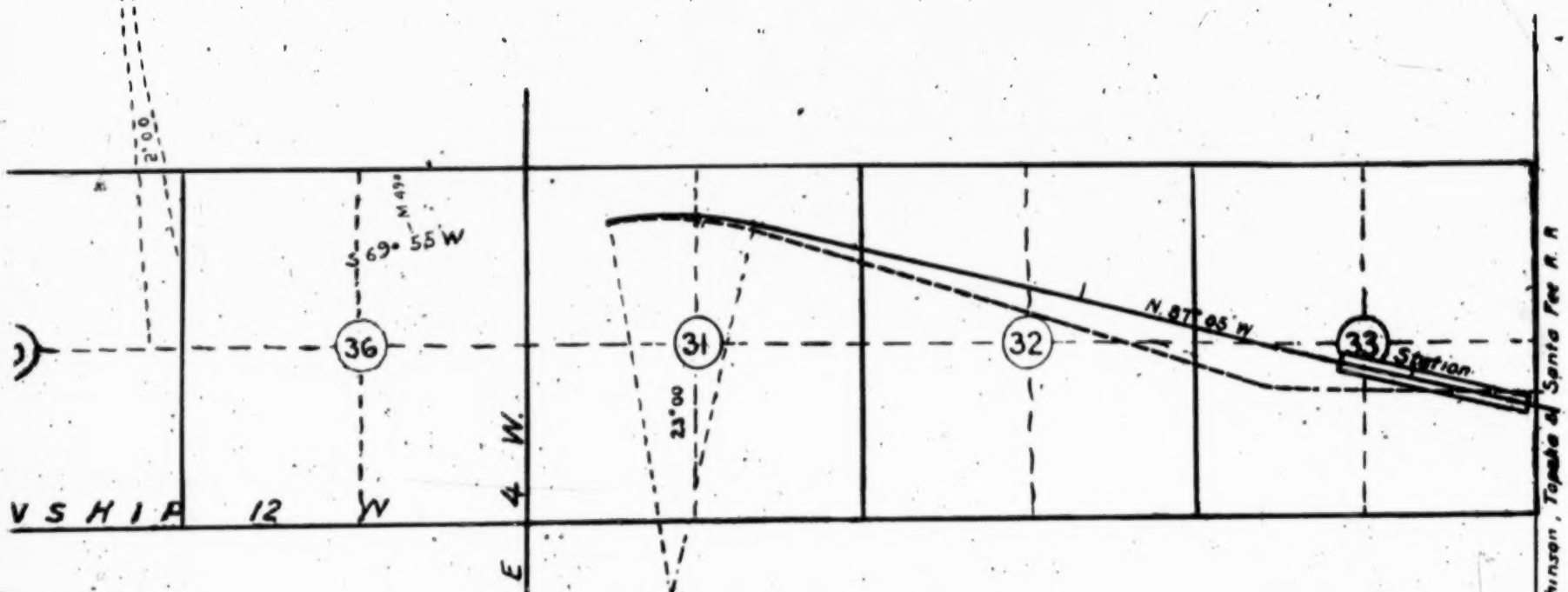
(Here follows drawing, side folio 158.)

[fol. 159] The defendant introduced in evidence as Exhibit 13 a plat of a part of the townsite of Oklahoma City showing the original survey of right of way and station grounds as made by the Railway Company before the Opening and shown on its map of location filed with the Secretary of the Interior on July 13, 1889, and also show-

a m.
Dept. of the Interior
July 13, 1889

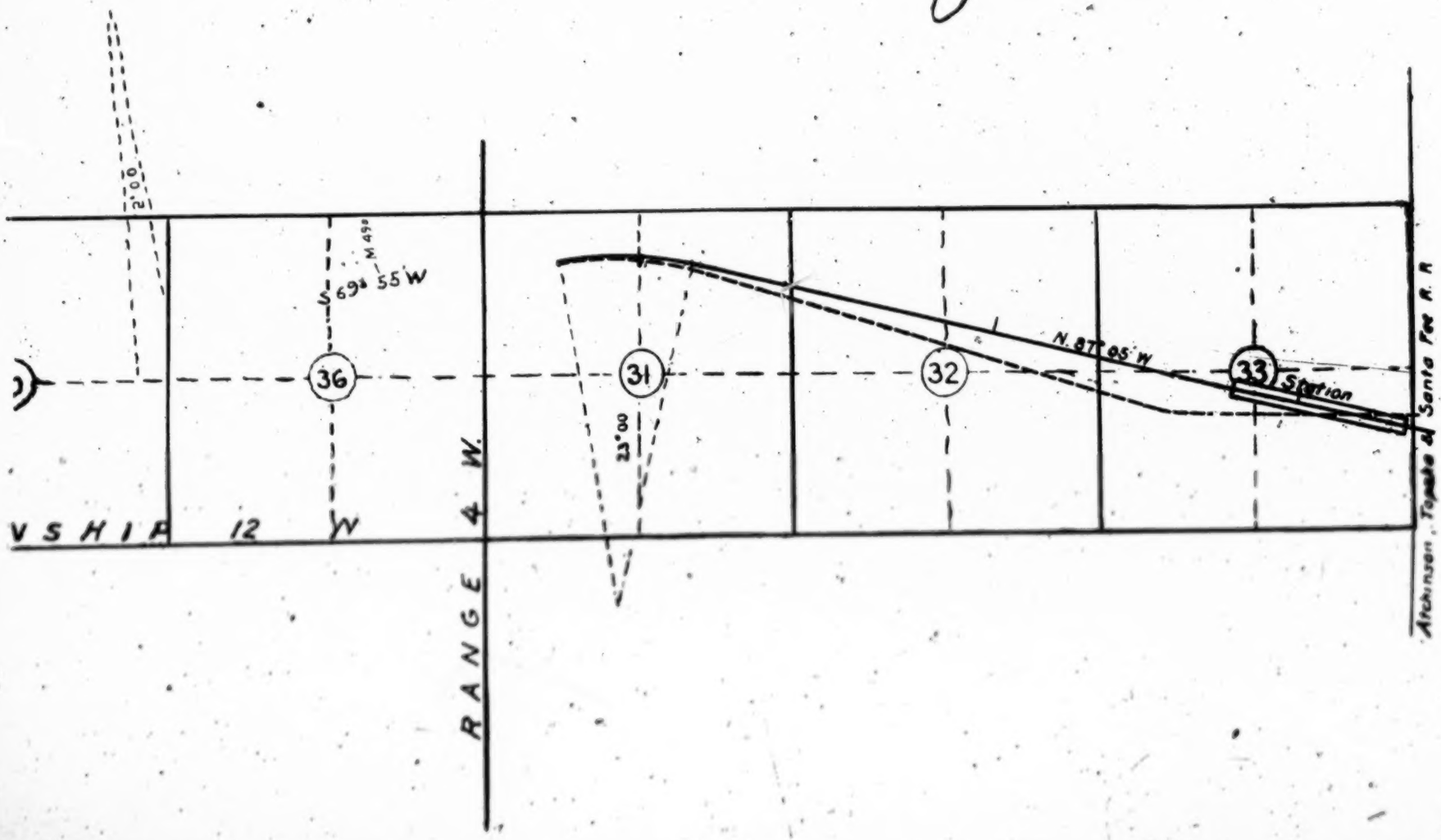
Approved as to that portion of the line of road hereon that passes over public lands and subject to the provisions of the Act of February 18, 1888.

Geo Chandler
Acting Secretary.

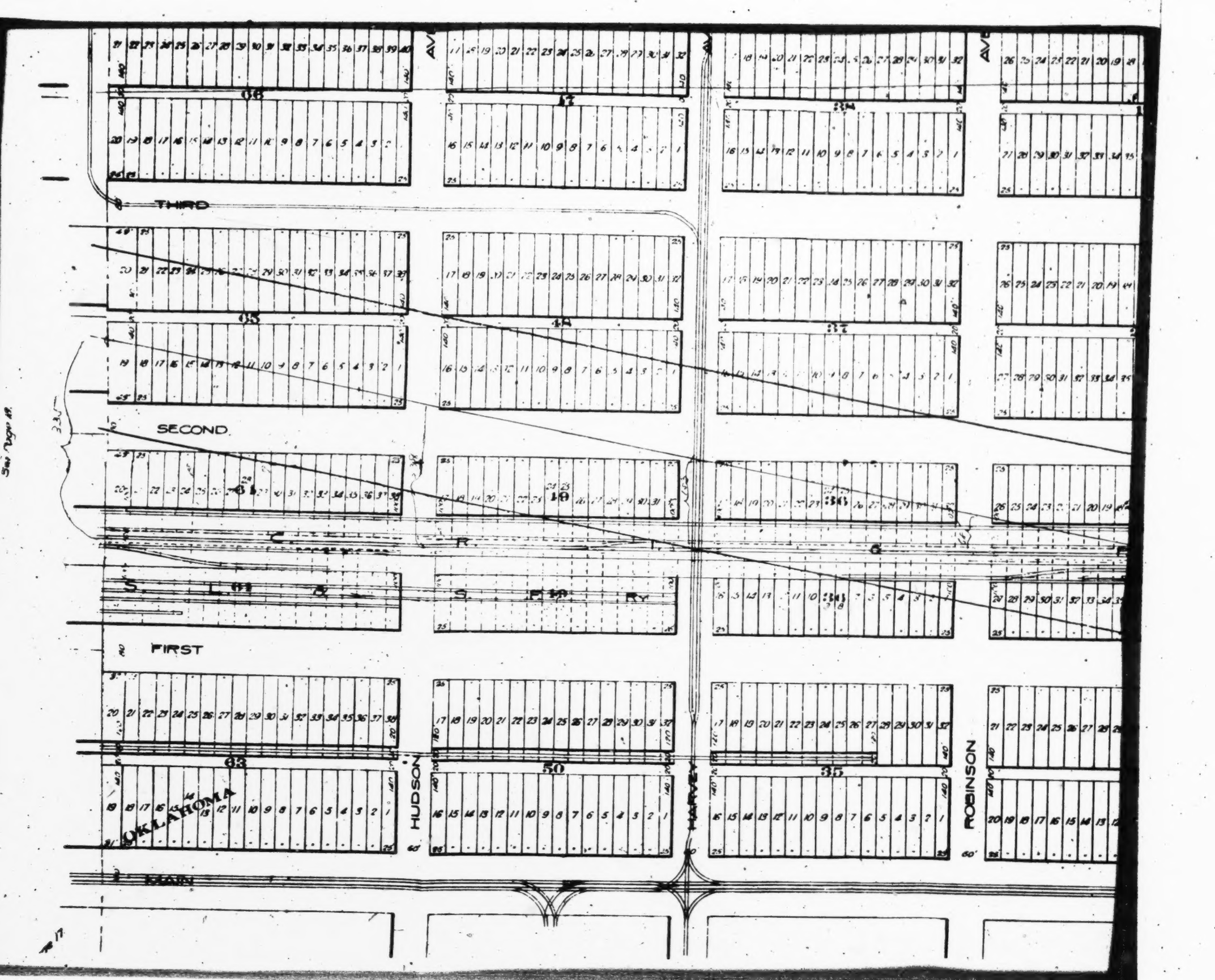


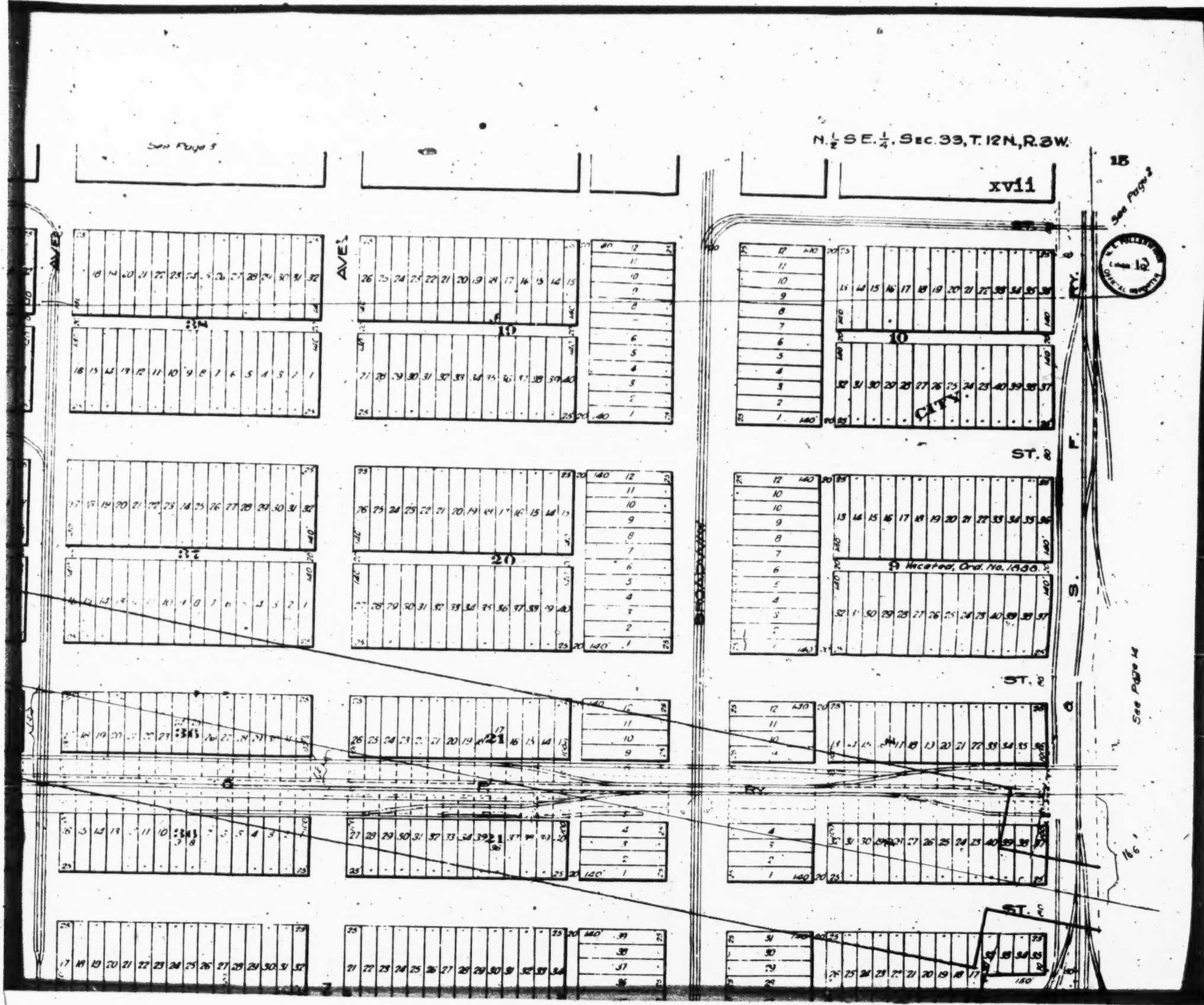
Approved as to that portion of the line of road hereon that passes over public lands and subject to the provisions of the Act of February 18, 1888.

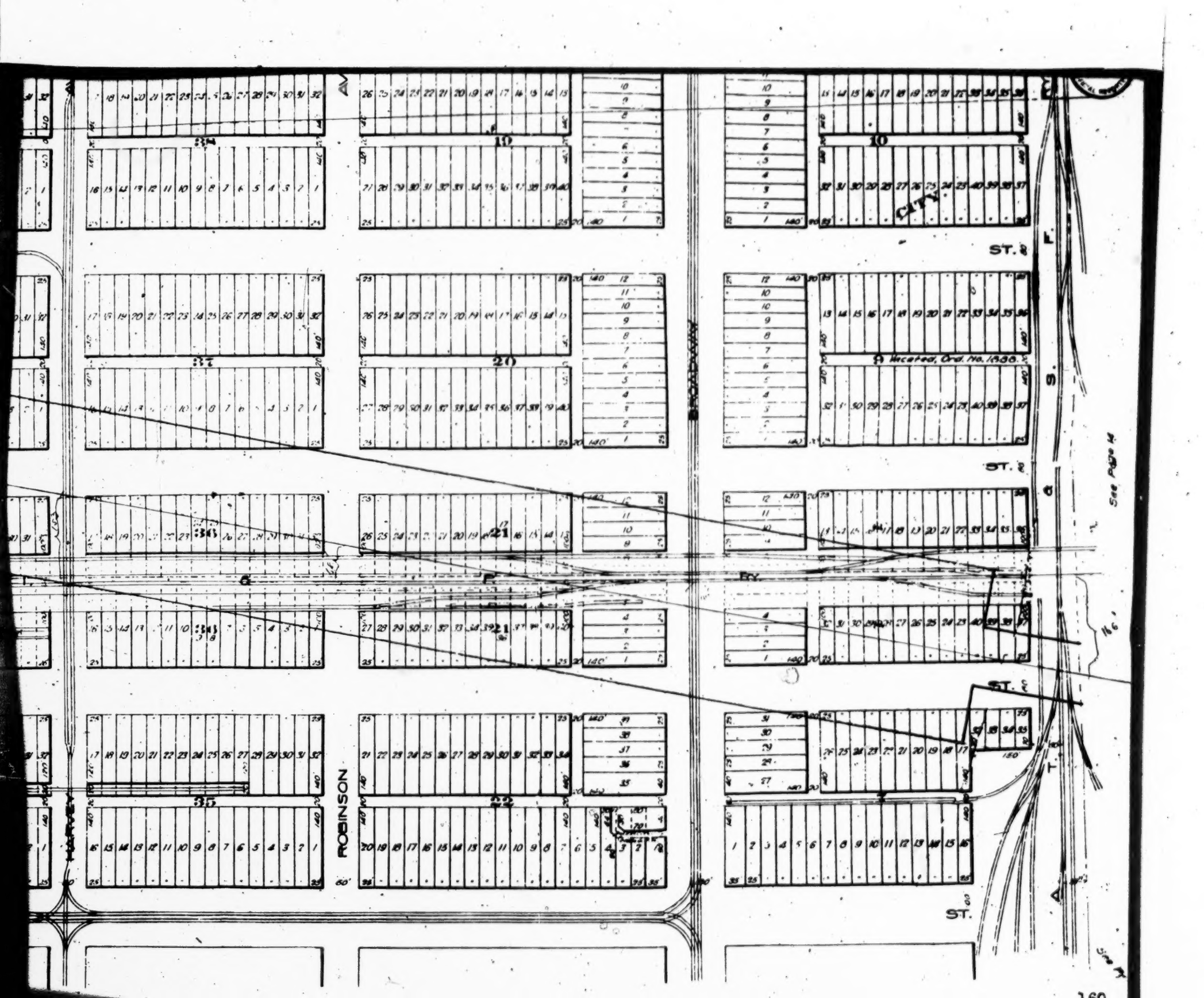
Geo Chandler
Acting Secretary.




See Page 9
See Page 9
See Page 9
FOURTH
THIRD
SECOND
FIRST
AVE S
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66
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C. R. I. & G.
S. L. M. & S.
S. P. R. R. RY.
DSON
INSON


THIRD
SECOND
FIRST
MAIN
HUDSON
ROBINSON
OKLAHOMA
S. L. & S. F. RY.
S. F. RY.
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N. ½ S E. ¼. Sec. 33, T. 12 N., R. 3 W.
XVII
See Page 3
See Page 5
See Page 14
AVE.
AVE.
BROADWAY
CITY
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ST.
ST.
ST.
RY.
RY.
F.
S.
Vacated, Ord. No. 1930.
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19
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21
186'


ROBINSON
BROADWAY
CITY
ST.
ST.
ST.
ST.
Ry.
Located, Ord. No. 1980.
See Page 14

ing the line on which the road was later actually constructed. The diagonal lines are the original survey and the horizontal lines between First Street and Second Street are those of actual construction. The exhibit follows:

(Here follows drawing, side folio 160.)

[fol. 161] Mr. J. W. Maney, being called as a witness on behalf of the defendant, being first sworn upon his oath, testifies as follows (CM-266-287):

Direct examination.

By Mr. Hull:

Q. State your name, please sir.
A. J. W. Maney.
Q. You live in Oklahoma City, Mr. Maney, at this time?
A. Yes, sir.
Q. You are a contractor?
A. Yes, sir.
Q. By profession?
A. Yes, sir.
Q. Mr. Maney, in 1889 and the early part of 1890, did you do some of the grading on the proposed location of the Choctaw Coal and Railway Company on the section of the road between the Santa Fe tracks running north and south through Oklahoma City and the Fort Reno Military Reservation?
A. I did.
Q. Do you recall when you began that grading, Mr. Maney?
A. Yes, I started the work west of where the markers of the Rock Island and what is known as the Choctaw road called for at that time, on the 4th day of January, 1890.
Q. The 4th day of January, 1890?
A. 1890; yes, sir.
Q. As I understand, you began at the west end of that [fol. 162] 25 mile section and graded toward the east?
A. Yes, sir, that's right.
Q. Just who was in charge of the construction for the Choctaw in this part of the country at that time, Mr. Maney?

A. The engineering department?
Q. Yes.
A. Mr. Cornelius.
Q. That's Mr. L. D. Cornelius?
A. Yes, sir.
Q. How far did he grade toward the east end of that section under which—you had a sub-contract under Mr. Spencer, didn't you?
A. Yes, sir, a sub-contract; I graded about four different parts of the line, one west of the Rock Island and three east; I can't say positive the number of miles I graded, but ten or twelve miles.
Q. You didn't, as I understand, do any grading through what was afterwards the townsite of Oklahoma City, under your sub-contract?
A. No, sir, I did not.
Q. Now, Mr. Maney, I wish you would look at this map, Exhibit 13. You are familiar with the City of Oklahoma City, of course?
A. Yes, sir.
Q. And are familiar, by reason of your past associations with the contracting business, with the character of ground that lies in the section to the east, on the north of First Street and up as far north, say as Third Street?
[fol. 163] A. Yes, sir, I think I am.
Q. You have had experience, too, in construction of railroad lines and you have built railroad lines in the past and I think contracted one time for 250 miles?
A. Yes, sir.
Q. In view of your familiarity with the character of the ground lying between First Street and Third Street on the north side and between the Santa Fe tracks and Walker Avenue here on the west?
A. Yes, I know the ground; yes, sir.
Q. Yes, sir; would you say, as a man familiar with the railroad construction, with the construction of a road as actually constructed on this plat as compared to what the construction would have been had it followed the red line as shown on this plat, which would be the more economical construction of that road?
A. The center line of the — that the road was constructed on, was on a practically level bottom land, what we might call light worked and that appeared to be a smooth quality

and the same rate of grade continued which would take heavier cutting, we went clear north as far as Third Street and encountered some rock, while there wasn't any rock on the lower line as constructed.

Q. As a matter of fact, the welfare and benefit to the community, Mr. Maney, which would you say would be the better line of construction, the straight east and west line where the road was actually constructed or the diag-
[fol. 164] onal line as shown on that plat.

A. Well, just as a general proposition, I would say that the line was constructed, as I understand by this map, near the alley and it cut lots of right angles, you might say, while the other line that was constructed at the right of your red lines there, it would cut the lots at an angle and probably be more value to the property.

Q. The red line construction, as I understand you, would leave the remainder of the lots in, almost in a top shape which would make it then of beneficial use; is that true?

A. That's the way I look at it; yes, sir.

Mr. Hull: Yes, sir; that's all, Mr. Maney.

Cross-examination.

By Mr. Garnett:

Q. Mr. Maney, the construction work, about which you testify which you began doing in January, 1890, that was out or near El Reno, was it not?

A. Yes, sir, north of El Reno, where the main line is operated now on that line.

Q. Just what was that railroad, the north and south railroad, known as at that time?

A. The north and south railroad was the Rock Island.

Q. The Rock Island?

A. Yes, sir.

Q. Still the Rock Island?

[fol. 165] A. Yes, sir.

Q. Now, you began about that line and this grading work, both east and west of it?

A. Well, we started west and done the grading work west first.

Q. First?

A. Yes, sir.

Q. When did you begin *to* grading east of the Rock Island?

A. Oh, well, the reason I remember the dates so well west was, it was the day after my birthday, the 3rd day of January, that's how I remembered the exact date when we started the work; I couldn't tell you exactly, but maybe March or April we went east.

Q. How far east did the work that you did extend?

A. It extended, oh, about six or eight miles west of here.

Q. West of Oklahoma City?

A. Yes, sir.

Q. And when did you reach that point with your grading?

A. Within the spring of '90; 1890.

Q. Or, the summer of 1890?

A. Yes, sir.

Q. That would bring it very close to the west line of Oklahoma County, wouldn't it, Mr. Maney?

A. Well, I presume so; yes.

[fol. 166] Q. Sir?

A. I presume it would.

Q. Yes, sir; in reference to the character of ground that the road had to be constructed over, about which you have testified from this map, Exhibit 13, was the fact known in 1890 or 1889, if you know, that there would be rock construction or rock excavation along the north or red line, the course shown on this map?

A. No, sir, I wouldn't know anything about that.

Q. You wouldn't know anything about that?

A. No, sir.

Q. You don't know when it was discovered that there might be rock excavation on that or there would be?

A. No, but I know it would be now.

Q. You know it now?

A. Yes, sir; I didn't know it then.

Q. Yes, sir.

A. Because, I had nothing to do with the grading at that time.

Q. Yes; now, you said that it would be of greater benefit to the community generally, in your opinion, to have the road constructed as it actually was constructed, through the city, that being on a middle line between First and Second Streets?

A. Yes, sir.

Q. And parallel to the east and west streets, as laid out?

[fol. 167] A. Yes, sir.

Q. And the alley through the middle, between those streets?

A. Located practically in the alley.

Q. Yes, sir; the advantage in that is that it cuts the lots at right angles, as you stated, instead of acute angles or taking the centers as the northwest or red line construction would.

A. It took off just part of the lots on each side of the alley.

Mr. Garnett: Yes, that's all.

Redirect examination.

By Mr. Hull:

Q. Mr. Maney, the grading that you began on the 4th of January, 1890, was on a part of this 25 mile section which was shown on that map of July 13, 1889, was it not?

A. Well, my understanding is that map of that 25 miles extended as far west as Fort Reno and I am sure it was this side of the Fort Reno road west of the Rock Island, where the Choctaw crossed the Rock Island Railway.

Mr. Hull: That's all, Mr. Maney.

(Witness excused.) (CM-26-287.)

[fol. 168] Mr. L. D. Cornelius, being called as a witness on behalf of the defendant, being first duly sworn upon his oath, testifies as follows (C-M-288-316):

Direct examination.

By Mr. Hull:

Q. State your name.

A. L. D. Cornelius.

Q. Where do you live now, Mr. Cornelius?

A. Pittsburg, Kansas.

Q. And what is your profession?

A. Civil Engineer.

Q. How long have you been engaged in that profession?

A. About fifty-five or six years.

Q. Did you have any connection with the Choctaw Coal and Railway Company in the years 1889 and 1890 and 1891 and '2?

A. I did.

Q. When did you begin your connection with that company, Mr. Cornelius?

A. The first?

Q. Yes, sir.

A. In August, '88; 1888 in August.

Q. And in what capacity were you connected with them?

A. Transit man at that time.

Q. That was on, I assume, the operation of the line from McAlester?

[fol. 169] A. Yes, sir, and in Texas, to Dennison.

Q. Yes, sir; and, was that—that was the line from Dennison up to what was called Tobucksey County?

A. That's where it started for; yes, sir.

Q. This Tobucksey County, do you know or do you not know, Mr. Cornelius, that that was where the present town of Hartshorne or Haileyville, Oklahoma, is?

A. No, I wouldn't recollect.

Q. You don't know where Tobucksey County was?

A. Oh, only in a general way.

Q. Where was your east and west construction point, so far as the eastern terminus was concerned?

A. The construction or the survey?

Q. Your surveys.

A. The surveys were started at McAlester and went east.

Q. How far east, approximately?

A. About seventy-five miles.

Q. About seventy-five miles?

A. Yes, sir.

Q. And then from McAlester west?

A. Yes, but on the west side our surveys were broken; we had certain points we wanted to cover and we never did do the work continuously and we had to leave gaps to finish later, but at that time we did some work as far as the south Canadian crossing but that was in 1890.

[fol. 170] Q. Did you have any connection with any of the surveys that passed through Section 33 and on which the City of Oklahoma City was afterwards located?

A. Was I on the survey?

Q. Yes, sir.

A. Yes, sir.

Q. What was your connection with the surveying party and the road at that time?

A. I had charge of the party.

Q. You were in charge of the party?

A. Yes, sir.

Q. Mr. Cornelius, you have examined in my office a map that has been introduced here that bears the date originally of July 13, 1889, have you not?

A. Why, I believe so (witness examining Exhibit 11).

Q. That's this map?

A. Yes, sir.

Q. Beginning at the Santa Fe tracks and running through Oklahoma City and extending twenty-five miles west to Fort Reno?

A. Yes, sir.

Q. At the time the country was opened on the 22nd of April, 1889, what was the condition of that survey with reference to the ground itself? Was it staked, is what I am wanting to ask you?

A. At the time of the "opening?"

Q. Yes, sir.

[fol. 171] A. Yes, the entire line across the original claim was staked and marked across the entire claim.

Q. In addition to the stakes and the markings which the company used in their caution to protect its right of way, the day of the "opening?"

A. They did in places; yes, sir.

Q. Did they, to your knowledge, in this quarter section, or do you know?

A. On, the right of way was marked or the center line was marked.

Q. The line being marked, and in addition to that you say that in places they used other means of warning; what other means did you use?

A. Written or printed signs.

Q. Did you have any of your company employees stationed along your right of way any where?

A. Yes, sir, in places.

Q. Well, for what purpose.

A. For the convenience of people who were looking for claims both east and on the west side of the Santa Fe and over on the east side.

Q. To assist them in locating the corners, do you mean?

A. Yes, sir.

Q. And was it also for the purpose, or was it not for the protection of your right of way from settlement?

[fol. 172] A. Yes, sir; yes, sir.

Q. Did those precautions protect your right of way?

A. Yes, they did to a great extent but not entirely.

Q. Well, were there settlements made on your right of way?

A. There were.

Q. When you began the construction of this road, the 25 mile section, between the Santa Fe track and Fort Reno, I understand from Mr. Maney that the construction was begun on the west end of the Section; is that correct? The grading was begun on the western end of the twenty-five mile section?

A. Well, through this section of the country it was; yes, sir.

Q. Yes, sir. Why was that, Mr. Cornelius?

A. Where?

Q. Why?

A. Because it was the only practical place left for us to begin the construction; that is, what was known as, then; the west side of the territory.

Q. Why do you say it was the only practical place?

A. Because we had no right of way on this side.

Q. Why didn't you?

A. Well, our right of way was "jumped" on the 22nd of April, 1889.

Q. The people who came at the opening disregarded your stakes and notices and settled on your right of way [fol. 173] as they passed through this, what was afterwards this townsite?

A. Yes, sir.

Q. Is that correct?

A. Yes sir.

Q. And for that reason you couldn't clear it so you could begin your grading and finish in each section.

A. We went through on the west side.

Q. Yes, sir.

A. We had some steel in transit and we had to have a place to unload that material, that is, we had steel and ties and telephone poles in transit at that time, or, we understood they had it loaded, rather.

Q. Now, Mr. Cornelius—are you through?

A. Yes, sir.

Q. Mr. Cornelius, do you know the position of the actual construction of the road, do you not, where the road was afterwards actually constructed?

A. Through the townsite here?

Q. Yes, sir.

A. I do.

Q. That was not on the exact line which had previously been surveyed?

A. No, sir.

Q. Do you know why the line of actual construction runs east and west while the map showed a line extending in a generally north-westerly direction?

A. Why, the main line east and west to town was constructed?

[fol. 174] Q. Yes, sir

A. I think I do.

Q. Tell the Court why that was, Mr. Cornelius, if you know, to your own knowledge.

A. It was a matter of expediency and it simplified the matters in regard to getting started on our construction and it was also desirable from a construction standpoint too, as far as buildings were concerned in the future; that was considered at that time; when I first put the line through, there wasn't anything done; was no buildings at all then.

Q. I understand, Mr. Cornelius, it's alleged in the reply filed in this case that a controversy had arisen between the citizens and the occupants of that territory or portion of the townsite and the railroad company as to the right of the road to the particular property; are you familiar with that fact, that there was some controversy existing at that time?

A. Yes, sir.

Q. That controversy started immediately after the country was opened and you found your right of way had been settled upon, did it not?

A. Yes, sir.

Q. And negotiations were conducted and the threats of litigation continued through quite a period of time?

A. Why, in fact, we pulled our "outfit" out of the country here and went over east so we could get something finished.

[fol. 175] Q. Mr. Cornelius, did you locate the line that was afterwards actually constructed upon that line running due east and west from the Santa Fe?

A. Yes, sir.

Q. When did you make that location?

A. Sometime between the 10th and the 17th of September, 1890.

Q. Between the 10th and the 17th of September, 1890?

A. Yes, sir.

Q. And that was the location upon which the road was afterwards constructed?

A. To the best of my belief it is; yes, sir.

Q. At that time, did you mark it to the point where your transit points?

A. Yes, sir.

Q. And that location that you made between the 10th and the 17th of September, 1890, was afterwards approved by Major Shellenbarger who, I understand, was the executive officer of the road in this country at that time?

A. Yes, sir.

Q. And the road was later constructed on that location?

A. It was.

Mr. Hull: I think that's all.

Cross-examination.

By Mr. Garnett:

Q. Mr. Cornelius, you were on the survey through Oklahoma City, which is now Oklahoma City, in 1889, I believe [fol. 176] you stated?

A. Yes, 1889.

Q. That was in advance of the "opening" of the territory, including Oklahoma City, to public settlement on April 22nd, 1889?

A. Yes, sir, we were "sooners."

Q. Yes. The profile or location map, which has been put in evidence as Exhibit 11, that shows the survey that you made at that time?

A. On that map?

Q. Yes, sir.

A. Yes, sir, that's the survey we made at that time.

Q. When did you begin that survey and when did you complete it?

A. At what point?

Q. Down on this twenty-five mile strip or this twenty-five mile section?

A. The latter part of February and March and April, the middle of April and we were here right up to the 22nd and after the 22nd.

Q. Which end of this twenty-five mile section did you begin your survey?

A. The Santa Fe.

Q. Begun at the Santa Fe and surveyed west?

A. Yes, sir.

Q. And then you began your survey at the Santa Fe, you would say the latter part of February, 1889?

A. The latter part of February or later.

[fol. 177] Q. Or later?

A. Yes.

Q. Now—— (interrupted).

A. It was between February—it was the winter and spring, and about the middle of March, or, I should say the middle of April.

Q. The middle of April?

A. We was doing this field work on both sides, both sides of the Santa Fe.

Q. Of the Santa Fe?

A. And it would be hard for me to exactly fix the dates of those particular surveys.

Q. Yes, sir. Well, are you able to say that the survey from the Santa Fe west had been made before April 22nd, 1889?

A. Yes, sir, and through—clear through the territory.

Q. Yes.

A. That is, the original Oklahoma Territory, it was all surveyed and staked down before April 22nd, 1889.

Q. Now, then, how was it staked out? The stakes marking the center of your proposed line of road?

A. The center line—yes, sir—and it was usual to drive those stakes a hundred feet apart?

Q. A hundred feet apart?

A. Except where topography and water elements called for stakes closer than that.

[fol. 178] Q. Yes. There were no stakes marking the outside boundaries?

A. There were places; yes.

Q. There were at places?

A. Yes sir.

Q. Were there in this section, southeast of thirty-three, what's known as the Oklahoma City Section, marking the outer boundaries of your previous surveys?

A. Yes, sir, there was stakes set there; center stakes.

Q. How far apart were they?

A. Through the center line, the center line of the stakes were a hundred feet apart and our station, "naught" was at the center of the Santa Fe main line.

Q. Yes. Now, the stakes which you say marked the outside boundaries of your proposed right of way, how far apart were they?

A. The outside bounds and corners, the outside corners were staked and signs put on them, written with red keel, that's what they used for marking stakes and the only thing available here at that time.

Q. Yes; all right. Now, you had stakes at the outside corners?

A. Yes, sir.

Q. How far apart were those corners then, or those stakes?

A. Well, three hundred feet; well, the present distance would be three hundred and the next distance from the corners would be three thousand foot long to your stakes.

[fol. 179] Q. How far are these stakes along the outside?

A. At points of visibility.

Q. That's all?

A. Yes, sir.

Q. Then, these corner stakes you referred to were three hundred feet apart across that line of the proposed right of way?

A. Yes, sir.

Q. And were three thousand feet apart parallel to it with the stakes at intervals in between?

A. Yes, sir. That would cover it.

Q. And then you had signs up along; were those signs along the edge of the right of way or outside of it?

A. They were on the boundary of the road.

Q. The boundary of them?

A. Yes, sir, at noon April 22nd, 1889.

Q. And those signs contained some form of notice that that had been surveyed and taken for a railroad right of way?

A. Well, that would describe it; yes, sir.

Q. Do you know what was on them, exactly?

A. The right of way of Choctaw, Goal and Railway Company; something to that effect; a short sign; we didn't have very much room.

Q. Now, I believe you testified the line later was actually located differently from that shown on this location map? [fol. 180] A. Yes, sir.

Q. In the meantime, did you make other surveys of other proposed locations through and around Oklahoma City?

A. Between the 22nd of April, 1889 and the first or second week in September of the '90's, do you mean?

Q. Yes.

A. We made—we changed some of our locations west, a few miles west of here and we ran a lot of—later we ran another line north of here.

Q. Well, did you run a line south also?

A. Yes, sir.

Q. That was during the time that the controversy was on between the railroad and the citizens over who was entitled to this property where your right of way was located?

A. Yes, sir.

Q. I may say that the newspapers of that time referred to the north, proposed north survey or proposed south survey, so you ran at least two lines of survey or possible location in addition to the one that is shown on this Exhibit 11?

A. Well, I don't know whether there is any newspaper controversy about it or not, sir.

Q. Well, you did make or you did survey?

A. We made the survey; yes.

Q. With the view of the possible location of the road on those surveys, did you not?

[fol. 181] A. The one north, especially so; yes, sir.

Q. What was the one south made for?

A. I don't know unless to keep the boys busy at that time.

Q. Yes, sir.

A. Would be about the only reason I can assign for it, now. (Laughter.)

Q. Now, immediately on the opening on April 22nd, 1889, your right of way through Oklahoma City was "jumped," as you call it, was by claimants?

A. Yes, sir.

Q. That's correct. All of your right of way was occupied by persons claiming it as settlers, was it not?

A. Yes, and it was done very suddenly.

Q. Yes, done within twenty-four hours at least after April 22nd?

A. Twenty-four minutes.

Q. Sir?

A. After they commenced to fill up the others, it was about twenty-four minutes.

Q. Twenty-four minutes?

A. Yes, sir. (Laughter.)

Q. These claimants or settlers disregarded your stakes that had been driven for this right of way entirely?

A. Well, the ones who—the first ones probably, that was probably a lawful disregard of our rights.

Q. (Continuing) Come in and they did, in fact, do that?

[fol. 182] A. Oh, yes.

Q. They just disregarded these stakes?

A. Yes, sir.

Q. And went on there and took their lots?

A. Yes, sir.

Q. Now, do you know when, or do you know that the plat of the survey of Oklahoma City, as afterward adopted by the townsite trustees and which had been marked Exhibit 5, that plat was made almost immediately after the "opening," was it not?

A. I think it was but I wouldn't be certain.

Q. Do you know a man by the name of Chamberlain, a surveyor, who surveyed the townsite here?

A. No, sir.

Q. You don't know him?

A. No, sir.

Q. Well, how did those claimants who "jumped" your claim, how did they make their claims?

A. Staked.

Q. Staked their lines?

A. And they "squatted" from those lines.

Q. Yes.

A. There was the Oklahoma City townsite within a few days; there was some lines staked out, as I recollect it, but I wouldn't be certain about that date; I think that there was right within a few days.

Q. And those lots staked are in conformity to the streets and alleys, as laid out, are in conformity to this plat, Ex-
[fol. 183] hibit 5, which was later adopted as the plat of Oklahoma City. That's correct, isn't it?

A. I believe they were; yes, sir.

Q. Within a short time, at least, the streets and alleys as they now exist, as shown and in use by the city?

A. Yes, sir.

Q. How soon did that occur after the "opening"?

A. Within a very few days.

Q. A few days—less than thirty days anyway?

A. Oh, yes, I should imagine so.

Q. You said that you made the survey of the line on which the road was afterwards built, as shown on these exhibits and as a matter of common knowledge, it was when it took a little course between First and Second Streets through the city, at the time you made that survey between the 10th and 18th of September, 1890, what's now First Street and Second Street, had been in use and occupied as a street for a long period of time, hadn't it?

A. Yes, sir.

Q. And these lots fronting south on First Street and north on Second Street was occupied and improvements put on them, had they not?

A. Did they front on First and Second Streets?

Q. Yes, sir, south on First Street and North on Second Street.

A. Oh, yes, they did that.

Q. You ran your line of your survey right down that alley and took about forty feet off of the back end of the
[fol. 184] alley on each side.

A. That was the intention at that time.

Q. Yes, sir.

A. To run the line down the center of the alley but there was not width of the right of way determined at that time.

Q. No, I see, but the right of way was later acquired?

A. Yes, sir.

Q. But, at the time you made your survey, these lots were all improved and occupied?

A. Well, not all of them.

Q. Not all of them?

A. No.

Q. Most of them?

A. Yes, sir.

Q. You stated that you began construction work at El Reno because it was the original point, as I understand you to explain, there was no controversy over a right of way and was over here, so you had no place to go to work; is that right?

A. Yes, sir, we had no home.

Q. Sir?

A. We had to go and do the work over there but to go and carry it out.

Q. And you were prevented from going to work here because people who had occupied these lots were claiming them?

[fol. 185] A. Yes, sir.

Q. And denying the railroad's title?

A. Yes, sir.

Q. Do you have any knowledge of the settlement of the controversy between the citizens and lot claimants on the one hand and the railroad on the other as to the change of the location of the right of way?

A. I don't know anything of the details.

Q. Yes; do you recall that the passage of the Bill through the House was procured to authorize the City to pay bonds to acquire the right of way along the line between First and Second Streets where the road was afterwards built and give it to the railroad if the railroad would change its location from the proposed location map first filed?

A. No, sir.

Q. You don't know about that?

A. No.

Q. Well, do you recall that there was a citizens committee organized and a fund raised by subscription to acquire that right of way between First and Second Streets and give

it to the railroad company in consideration, if the railroad company would abandon the line it was claiming for its located line and go through on that line?

A. Yes, there was a citizens committee that I met here several times and that was early in 1890 first.

Q. Yes; well——

A. But there wasn't any compromising stuff about it; we never recognized that there was any controversy about [fol. 186] our right of way or our rights of a right of way.

Q. What was the subject matter of those meetings and conferences of the citizens committee?

A. They were trying to compromise, to get the matter straightened out with the railroad company and the city of Oklahoma, to get this construction started across here.

Q. Yes.

A. The public were anxious for the railroad to be built.

Q. Yes; and the railroad company was anxious to get it built.

A. Yes, under their rights.

Q. Yes, under their rights. Now, as a result of their conferences, do you know whether or not it was agreed that the citizens would satisfy the lot claimant and procure the right of way through between First and Second Streets where the road was later built and where you ran your September, 1890, survey, if the railroad would accept that and abandon its claim to the right of way as originally located north of that right of way and let those lot claimants have their lots?

A. It was done but not for that reason.

Q. Well, it was agreed upon that it would be done and it was done; is that right?

A. With the——(interrupted).

Q. I am not asking for the reason; I am just asking for the facts.

[fol. 187] A. Yes, it was done.

Q. It was done by agreement?

A. Not entirely, sir.

Q. Well, the railroad did, in fact, accept a right of way between First and Second Streets as surveyed by you and in September, 1890, was it not?

A. Their acceptance had nothing to do with the citizens committee.

Q. Well, they did it anyway?

A. They did it; yes, sir.

Q. And they abandoned their claim to the——

A. We had an amended plat; an amended survey.

Q. Yes.

A. Yes, we had a right to do it under the grant of Congress.

Q. Yes; I wasn't asking you how you had a right to it; I just wanted to find out what you did.

A. Yes.

Q. Now, then, the line as located on this location map, the first survey you made in the spring of 1889, that was abandoned for the east and west line between First and Second Streets?

A. They were on the amended line; yes, sir.

Q. But, made no further claim to this north located line, did they, to your knowledge?

A. I couldn't say as to that. The matter rested in status quo, I should judge.

[fol. 188] Q. And now, after forty years, it's still in status quo, this north located line?

A. No, it's been pretty active down on that right of way in the last forty years.

Q. Well, I am referring to this north located line which you surveyed across here in the spring of 1889.

A. Yes, sir.

Q. And as far as you know, there has been no claim made by the railroad that this line north of the present right of way, that was included in that survey.

A. No, I think not; not to my knowledge.

Q. Yes, sir. Now, you said you made an amended survey; when did you make that plat; was that based on your survey of September, 1890?

A. That was—yes, sir, the latter part; I can say the fore part of September, 1890.

Q. Well, you said it was between the 10th and 18th of September, 1890.

A. Some place along there—yes, sir—the 10th and the 18th.

Q. Do you know where there is a plat of that survey just referred to as an amended plat?

A. I don't know, sir, where it is.

Q. Do you recall any of the persons that were on that citizen committee you met with and conferred with about settling the controversy?

A. I do; yes, sir.

[fol. 189] Q. Who were they?

A. I don't know who they all were but—oh, now this is practically, this is purely from recollection.

Q. Yes, sir, I understand.

A. Mr. Pettee or Pattee was one of the citizens committee and Mr. Overholser here, I think his name was, was quite active and Major Hidecooper from Erie, Pennsylvania, I don't know whether he was on—I don't think that he was on the committee himself, but he was in the advisory capacity with the committee and a Mr. Delaney who was receiver of the Land Office at that time; I think his initials were J. C. Delaney and Judge Burford.

Q. Did you meet Doctor A. C. Scott; do you recall him in connection with this?

A. Doctor Scott?

Q. Yes.

A. I remember a Scott but I don't know whether it's the —I can't place him.

Q. Yes, sir.

A. Is that the gentleman? (indicating).

Q. Yes, sir, that's Doctor Scott.

A. Yes, sir, I have seen him before; I never happened to see him again, from that time on until this morning in the Court room; that is, to know what his name was except that I possibly got out there—may I ask that gentleman a question?

Q. Well, it's all right with me; I don't care.

[fol. 190] A. It might be a family resemblance, that I later knew a John B. Scott.

Q. Yes.

A. That's why, but there is something about that gentleman there that struck me very——

Q. Well, do you recall that he had some part in those negotiations?

A. Yes, sir, I am quite certain of it.

Mr. Garnett: That's all.

Redirect examination.

By Mr. Hull:

Q. Mr. Cornelius, the north and the south surveys that you think were amended and were entirely out of the

quarter section on which the townsite was afterwards located, were they not? The north survey was two miles and a half north?

A. Oh. Yes, sir.

Q. And the south survey was on the other side of the river?

A. Oh, south survey from the south side of the Canadian River and our north survey, which was west would have been followed if they hadn't recognized our rights to a certain extent, began over here by Council Grove, about eight, probably eight or nine miles west of here and crossed the divide out here about two and one-half or three miles north and joined our old original survey about eight miles east and that was the line that they were determined to fol- [fol. 191] low at that time and it would have been followed there if it hadn't been for Major Shellenbarger recognizing the fact that there were lots of innocent purchasers on that ground and they said they might be able to protect; and that was the reason for Major Shellenbarger violating that change.

Recross-examination.

By Mr. Garnett:

Q. Yes, Major Shellenbarger was the executive officer of the road?

A. He was the chief engineer located at, his headquarters at McAlester.

Q. Yes.

A. And in Dennison, Texas.

Q. Now, the north route, two or three miles across the town, north of the present line?

A. Yes.

Q. Would have been followed on but he wanted to recognize the rights of innocent speculators along this bed route, as located?

A. Yes, sir.

Q. All right. If it hadn't been for that fact, then the road would have definitely changed this first location and built along this northern location?

A. Yes, sir.

Q. Recognizing that people had settled on lots down here in town, expecting to be close to the railroad, he made the

arrangement with the city, they agreed to the proposition [fol. 192] of changing lines to go through parallel to the streets and alleys as laid out on the plat?

A. Yes, sir.

Q. And that right of way was furnished by Oklahoma City, or, its citizens, without cost to the railroad?

A. Part of it was; not all of it.

Q. Did the railroad pay for any of it?

A. No, but they had it by Congressional Grant; they had part of that.

Q. Yes, that's what they claim.

A. What was an original right of way, three hundred feet wide and they compromised the course two hundred and fifty or three hundred feet west of the Santa Fe.

Q. Yes; but, now, did the railroad pay anything for this later acquired right of way, where they actually built?

A. I don't know whether they did or not. You will have to ask the right of way man.

Q. You don't know?

A. No, sir.

Q. You don't know that the City raised ten thousand dollars and paid the lot owners for that right of way, do you?

A. No, I don't know whether they did or not; it wouldn't have been up to me; it was out of my jurisdiction.

Q. Yes, sir. All right, now, you say that line as located, I mean as actually built and that line which was located on your first survey pro rata, was it not?

[fol. 193] A. Yes, sir.

Q. Do you know that the occupants of those lots did not recognize the railroad's claiming right of way and that the right of way from them was purchased by the citizens committee, just the same as the other?

A. I don't know what was done.

Q. You don't know what was done?

A. No, our right of way was all "jumped."

Q. "Jumped"?

A. Yes, sir, that was the term that they used at that time.

Q. Yes, sir, it's pretty well understood, I guess. Now, this fact you are clear on, that the railroad did not purchase, as far as you know, any right of way on the final location where it was built?

A. I don't know, sir.

Q. Oh, you don't know?

A. No, I don't know who bought it or the price and I wouldn't be in a position to know.

Q. Or, whether the railroad company paid anything to anybody or whether it was acquired by the citizens that gave it to the railroad?

A. I only know, sir, that there was a Citizens Committee active in getting those matters straightened out but what it was or what the terms were or the amount, I couldn't say.

Mr. Garnett: Yes, sir. That's all; that's all.

[fol. 194] Redirect examination.

By Mr. Hull:

Q. Mr. Cornelius, do you know that the Choctaw Coal and Railway Company was in pretty straitened and financial circumstances, don't you?

A. Yes, sir, very much.

Q. You know, as a matter of fact, that they later sold their right to the road which was afterwards known as the Choctaw, Oklahoma and Gulf?

A. Yes, sir.

Q. And when did you leave the employ of the Choctaw Coal and Railway Company?

A. On the 31st of December, 1890.

Q. And did you remain in this country or did you go somewhere else?

A. I went to Dennison, Texas.

(Witness excused.) (CM 288-316.)

[fol. 195] Mr. J. M. Owen, being called as a Witness on behalf of the Defendant, being first duly sworn on his oath, testifies as follows (CM 328-344):

Direct examination.

By Mr. Hull:

Q. Just have a seat, sir. State your name to the Court.

A. J. M. Owen.

Q. You live in Oklahoma City, Mr. Owen?

A. Yes, sir.

Q. And, at this time, are connected with The Oklahoma City Building and Loan Association?

A. Yes, sir.

Q. That's the original, was it. You were here the day of the "Opening" of the country on April 22nd, 1889?

A. Yes, sir, I got in town late that evening.

Q. Mr. Owen, I wish you would tell the Court what you know about the condition of the proposed right of way of the Choctaw Coal and Railway Company on the day of the "Opening," April the 22nd, 1889, if you — anything about it?

A. Not on that date, I wouldn't; I camped the first night —I come in from the east line; I drove in, in a spring wagon—the Kickapoo line—and camped up here on what is Linwood, now; it was called "Lone Grove," this patch of timber, it was, on the high hill; Linwood, it is, now; we camped there the first night and didn't come down in town here at all. We got up early, the next morning and about [fol. 196] sun-up and came on down town and the first, we attempted to "settle" on this quarter section just east of the Santa Fe here, but, that was a Military Reservation and we weren't permitted to "settle" there, so, we turned on down and came in on Reno—what is now Reno—that was a Section line and I "staked" a lot on Reno, and then, I "staked" one on Washington and I was pretty busy that day and I didn't get up in this part of town for a day or two but I went in to the real estate business, buying and selling lots; that is—trafficking in lots—I didn't buy any and in the maneuvering around here in this part of the town, the first time I came up here was a few days afterwards, there were stakes there, saying: "Keep Off," the Choctaw Coal and Gulf—no, the Choctaw Coal and Railway Company right of way and just a short time after that was when I first came in, that were no—that is, after I had located in town, there was no "proving" here and it wasn't for two or three days, you built shacks, there was no houses built at the time and the first lumber that we got was—there wasn't any stuff shipped in here, I think it was about the 27th or '8th; well, it was just tents up here and there and it was a tent town. Then, a few days—I don't know how many days after the country "Opened"—there was fur-

rows plowed through there and a furrow on each side of the right of way, as best they could plow it, showing the right of way; kinda marking it out.

Q. Did the people regard those warnings or did they disregard them and occupy the places?

[fol. 197] A. When we got here, the townsite wasn't surveyed at all and we surveyed it ourselves. One outfit was started by Charlie Chamberlain, he took Main Street and surveyed on north and the surveyor went along; we all adjusted ourselves to these lines as the surveyor went along and when he got to the railroad right of way, he paid no attention to it; he just "plowed" right on through it.

Q. You just kept on adjusting yourselves, did you?

A. We just kept on adjusting ourselves, as surveying the lots right along. Well, another Surveyor by the name of Patrick started a survey at the section corner on Reno Avenue and started south. Then, there was a Citizens' Survey that started from Reno Avenue and started north. There was three (3) Surveys, surveying outfits; then, we all adjusted ourselves to these different surveys.

Q. Mr. Owen, after the proposed right of way, or, the right of way, as it was marked on the ground, was occupied by the people who came in on the day of the "Opening", were any negotiations begun, looking towards clearing that right of way, or, else, having the railroad built through some other portion of the townsite, what was afterwards the townsite?

A. I never heard them claim any other location except right through town there and they were insisting on it. I remember Mr. Chadick at the time; he was President of the Choctaw, wasn't he? He was over here; he had come over in a private car, I remember, once in awhile but he would stay on the side-track down here, out at Kala—an [fol. 198] inland town over there—park on it and the lots on the right of way, they claimed there, would fluctuate the prices on them, and, people would disregard it, and then, they would some way or another, create the feeling that they were going to build through there and you had better not build on those lots and the people didn't improve them very much and the prices of the lots would go up and down, they would fluctuate, as the people would have to move; they would lose their lots if they built there and then, in a little while, they would get over that. I remember I bought one

lot on Broadway some time during the summer of '89, when the tide was running against the lot owners, the feeling that the railroad was going to build through there, I bought a lot for twenty-five dollars ($25.00) on Broadway, and, in that Fall, in December, when the people doubted whether they would ever build through there or not, I "climbed" out; I sold that same lot for one hundred and twenty-five dollars ($125.00); and then, along the next Spring, why, I could have bought it for less money and wouldn't buy it. So, they just fluctuated that way. (Laughter.)

Q. Well, Mr. Owen, it's a fact, isn't it, that those negotiations and the controversy over the title to the property in the right of way and the right of the railroad to take this right of way through the townsite continued over a period of eighteen (18) months or more after the country was "opened"?

A. Oh, it continued until it was finally settled.

[fol. 199] Q. It was settled by the Quit Claim Deeds that were taken?

A. Yes, we jumped out here and voted Bonds, forty thousand dollars ($40,000.00) in Bonds to clear that right of way, and then, went to Congress and made it materialize and they passed that through Congress and the President vetoed the Bill.

Q. On the theory you had no power to issue bonds for that kind of a concession?

A. Yes, sir, the Territory had no right and was later re-enacted.

Q. And they did raise the money by subscription among the citizens of this town and paid those people, in consideration for those Quit Claim Deeds?

A. Yes, sir, the only way we could raise the money, was, by subterfuge; we started out; I was one of the Soliciting Committee and started out to raise twenty-five thousand dollars ($25,000.00); we believed that would clear the right of way and by subscription and we worked at it for, oh, several days and there wasn't anybody here had any money and we fell down and we wasn't able to raise it by subscription at all, and—at that time—we had a "Character" here, Mayor Gault and he "sprung" a proposition on us at one of the Meetings, that we meet and make a Report on these different conditions. He said: "People want this railroad; we will never be able to raise this by subscription; I see that and," he said, "I have thought the matter over and,"

he says, "I have a scheme in my mind, whereby, I believe [fol. 200] we can put it over; it's illegal", he says, "but," he says, "I believe that the community wants the road bad enough, that they will stand for it." "Well, what was it?" "Well, he says, "the Saloons here will pay a three hundred dollar ($300.00) City License and a two hundred dollar ($200.00) County License." He says: "If the Citizens will back me and the Council up, we will pass a Law, or, pass an Ordinance, accepting Choctaw Scrip, we will issue what we call Choctaw Scrip, we will pass an Ordinance accepting Choctaw Scrip for half of the Saloon License, City Saloon Licenses until this Scrip is all absorbed; that will make a market", he says, "for the Choctaw Scrip, at seventy-five cents on the dollar, I think we had ought to sign up, sign the Saloon people for seventy-five cents on the dollar and they will be glad to have it and it will finally absorb all that; now, you Gentlemen that subscribe five hundred dollars ($500.00) or a hundred dollars ($100.00) or twenty-five dollars ($25.00), whatever it was, payable, your subscription and you will gradually get your money back, on the question of expense and everybody will, share and share alike, in the expense of this, buying this right of way." J. L. Brown, an attorney, that was one of our advisers about anything of that sort, he got up and he said: "You are over-stepping the sanctity of the law by that; it won't stand up." And Mr. Gault said: "I knew that, but", he says, "I believe public sentiment is behind us and I believe they will do it." They did that and that's the way they raised the money.

[fol. 201] Q. In any event, some money was raised and the people who were claiming the north forty feet (40') of the south lots and the south forty feet (40') of the north lots were paid the consideration and executed a Quit Claim Deed to the Railroad Company for the road where it was actually constructed?

A. Yes, sir. Here was the proposition there: There was quite a number of people that owned those lots and they were not very valuable, especially after you had those parties that owned property elsewhere that would be more valuable if the road was on here and merely deeded their forty feet (40') for nothing; that's why we were able to get through with twenty-five thousand dollars ($25,000.00).

Q. And after you had cleared that right of way and stopped any possible litigation over it, then, the road was built across there?

A. Yes, sir; and, that had to be built by Receiver's Certificates, then; the Choctaw Coal and Railway Company prior to the time we got ready and complied with our contract, they went into the hands of a Receiver, and finally, Judge Clark ordered them to issue Receiver's Certificates and build the road from El Reno in, through Oklahoma City, with Receiver's Certificates.

Q. Mr. Owen, do you recall what was the date, or, approximately, the date of the final completion of this section between here and El Reno; was it early in 1892?

[fol. 202] A. Well, it was the Act of Congress that did that. I don't know. We had quite a "Blow Out" when it came in; I forget; no, I wouldn't say.

Q. Well, it was constructed through, though, of course?

A. Oh, yes.

Q. And operated as a road?

A. Yes; yes, sir.

Mr. Hull: I think that's all.

Cross-examination.

By Mr. Garnett:

Q. Mr. Owen, I have here, a Paper, marked Exhibit 14, which purports to be a part of the Minutes of the Meeting of the City Council on March 10th, 1891, where there was a Resolution adopted in relation to issuing those Certificates of Indebtedness, about which, you have just testified, (Counsel handing Witness Exhibit 14 for his examination.)?

A, The Choctaw Scrip?

Q. Yes?

A. Yes, sir.

EXHIBIT 14

Identification is waived and Exhibit 14 is offered and admitted in evidence. It is as follows:

[fol. 203] Minutes of City Council of City of Oklahoma City, Book 1, Page 101.

"Oklahoma City, O. T. Mch. 10th, 1891.

"The Council met as per adjournment with Mayor presiding and all members present. The minutes of the previous meeting were read and approved.

"On motion of Miller, the Mayor was authorized to issue certificates to all parties subscribing to the C. C. & R. Ry. Co. fund drawing 8% per annum, the same to be legalized by the legislature.

"The same carried unanimously.

* * * * * * *

"Adjourned to Saturday Night, Mch. 14/91.

T. M. Upshaw, City Clerk.

"Approved: W. J. Gault, Mayor."

By Mr. Garnett:

Q. Now, that "C. C. & Ry. Co." there is the Choctaw Coal and Railway Company, about which, you have testified?

A. Yes, sir.

Q. That has reference to those Certificates of Indebtedness?

A. Yes, sir.

Q. Yes. They never were, in fact, legalized by the Legislature, were they?

A. Not that I know of.

[fol. 204] Q. They were redeemed in the manner you have indicated?

A. Yes, sir.

Q. By being accepted in payment of Saloon License fees?

A. Yes, sir.

Q. I believe you stated that Charlie Chamberlain made a survey from Main Street, north?

A. Yes, sir.

Q. Within a few days after the "Opening?"

A. Yes, sir.

Q. Now, do you know, whether or not, that survey is the one that was later adopted by the townsite Trustees as the Official Survey of Oklahoma City?

A. It was.

Q. It's the one?

A. Yes, sir.

Q. And lots were "staked out," then, according to that Survey?

A. Yes, sir.

Q. This map that's been exhibited and put in evidence as Exhibit 5—I think it's 5—yes, that is it, at least, in-

cludes the Chamberlain Survey from Reno Street, north?

A. No; no, the Chamberlain Survey only came to here (indicating on Exhibit 5); just made this——

Q. That is, they were south?

A. The Chamberlain Survey only came to the street, I mean, to the north alley between Main Street and Grand Avenue.

[fol. 205] Q. Yes; all right; then it extended north?

A. Yes.

Q. And from there, north?

A. About to Seventh Street.

Q. About to Seventh Street?

A. Yes, sir.

Q. Yes, sir. Well, that's the top of the Map?

A. Yes.

Q. That's the Chamberlain Survey?

A. That's it.

Q. Yes; and, that's the same Survey that the City mapped on, from then on, until it was officially adopted by the townsite Trustees?

A. Yes, sir.

Q. And, is the Survey that constitutes the City, now?

A. Yes, sir.

Q. Then, how soon—you said, a few days; then, how soon after that, after April 22nd, was this made, would you say? Within a week?

A. Oh, it took several days to make that Survey.

Q. Well, it wasn't over a week or ten days, was it?

A. No, I don't suppose it was.

Q. And the lot claimants, then, following the running of the lines, for these streets and alleys and the lots in this Survey adjusted their lot discrepancies to conform to the Survey?

A. They were in the same, then, they had ever been, in the street; they would try to adjust themselves to one [fol. 206] side of the street or the other?

Q. Yes; did they correct their lot corners or stakes?

A. The Surveyors?

Q. Yes?

A. Yes, they did; they put down a stake for every lot, every twenty-five foot (25′) lot.

Q. Yes, sir; and, they staked the corners on every lot?

A. Every lot.

Q. Well, now, all the lots, at least, as far north as Second Street and beyond Second Street up to Seventh Street were claimed by somebody, just as soon as that Survey was completed, in any event, weren't they?

A. Well —— (interrupted).

Q. Or, virtually all of them?

A. Maybe not all; there were several days in the further western part.

Q. Yes, sir.

A. But, a majority of the lots were obtained, of course, right of ways as the Surveyor went along; everybody did.

Q. Then, when it came to this center railway right of way location, they disregarded that and surveyed and plowed right across it?

A. Yes.

Q. And people went in and "staked" their lots just the same as if the Survey stakes of the right of way were not there?

[fol. 207] A. Yes, sir.

Q. And those lots would remain in the possession of those occupants or somebody else claiming under them, down to now, have they not?

A. Yes, exception, as I say, for awhile, they wouldn't improve them and was afraid of them and were —— (witness interrupted).

Q. Yes; and, they were doubtful about whether their title would stand up?

A. And that controversy just kept the values very unstable there.

Q. Well, beginning within the period within a few days after, when you went in the real estate business, these lots were bought and sold and dealt in just as though they had legal title to them?

A. Well, they wouldn't everybody buy them.

Q. No but there were some who did buy?

A. Well, yes, at a discount.

Q. How would they describe those, now; by lot, somebody would come and take the place?

A. Yes and until after the —— well, our first deed was issued some time in October, 1890.

Q. Yes.

A. And, up until that time, why, we just claimed possessory right.

Q. Yes; and some of them, by deeds?

A. Yes, sir, Quit Claim.

[fol. 208] Q. Just Quit Claim Deeds?

A. Yes, sir.

Q. Well, you did execute them?

A. To the Quit Claim Deeds; yes.

Q. Well, Quit Claim Deeds from one lot claimant to a purchaser?

A. Yes.

Q. Do you know this particular lot involved here, Lot Six (6) in Block Thirty-six (36)?

A. I know where it is.

Q. Did you, at one time, own that and did you sell it to Naoma Noble?

A. No, I sold it for her.

Q. You sold it for her?

A. Yes, sir, I sold it for George Noble.

Q. Yes. Do you recall when they were living there or occupying that?

A. No, when I sold it for her, as I remember, Mr. Noble lived in McAlester and I corresponded with him about it and made the deal.

Q. I see. That was about her deed to the north forty feet (40') of the right of way?

A. Oh, yes; yes, because, as I remember, when I got that deed back from them, together with the Trustees' deed, this Choctaw Scrip was with that deed and I cashed the Choctaw Scrip.

Q. That is, his contribution to the railroad or the pay he got for his right of way?

[fol. 209] A. I think he contributed, in addition to giving that lot, I think twenty-five dollars ($25.00) or something of that kind and he had Choctaw Scrip for it and I got that Choctaw Scrip from them.

Q. Yes, sir.

A. They had other property here; the Nobles had.

Q. Yes, sir. Now, with reference to the controversy that arose later, had the railroad made the terms, Major Shellenbarger or somebody in authority for the Railroad Company, that, if this right of way was acquired between First and Second Street, where you did later acquire it and where the road did later build, that they would accept that abandon that controversy with these lot claimants

or where the right of way is shown on the reverse location?

A. They didn't have to abandon it, I don't think, because, they had their survey took in; the original survey, I think, took that in; as I remember, the Nobles out there took that in, a great deal of this property, it veered a little to the northwest.

Q. Well, all right, it took in some of it but not all; that was so?

A. As I remember, they claimed it didn't do more than to come in.

Q. And they claimed three hundred feet (300') here, as shown by Exhibit 11 introduced, as ground, as well as right of way?

A. Yes; so, they wouldn't be out—they wouldn't be off of their old, original right of way.

[fol. 210] Q. All right. Assuming they were not off of their original right of way, they accepted this right of way between Second and First Street and made no other claim to any other right of way outside of those bounds?

A. No, they did prefer to go through town.

Q. They agreed to do that if you, the Citizens' Committee, would get them this right of way; that right?

A. Yes; yes, sir.

Q. And as far as the fellows who were claiming that the railroad had no right of way, nevertheless, they were within the original plat?

A. No, they claimed that they had a right of way all the time but it was too hard to get the people off of it.

Q. Yes; and these people on there, didn't want to get off?

A. Yes.

Q. They claimed the railroad didn't have that right of way, didn't they; that's what they claimed?

A. Yes.

Q. All right. You did have the claims of the people who were making the claim that they owned the lots and the railroad took them; that right?

A. Yes.

Q. Do you recall, whether or not, the railroad then made public announcement that, for all purposes, it might not be best, that they would build the road north, three (3) miles north of town if the right of way wasn't obtained through town for them?

[fol. 211] A. There was something of that talked of but I never paid any attention to it; I didn't think there was anything to it.

Q. Yes, sir; it was just talked of?

A. Yes.

Q. In the newspapers, wasn't it?

A. Well, I don't know; I expect—I guess the newspapers did have it mentioned some but I never took it seriously; I don't know of any of it being written.

Q. Do you have any knowledge of whether or not the Railroad Company filed contest in the Land Office against the Entry of this quarter section of the townsite, with the townsite trustees?

A. My understanding was that they had filed their Maps and Profiles at the Land Office in October.

Q. Yes, but, I mean, a contest of the right of the persons to make Entry of this quarter section of land in the Land Office, just the contest in the Land Office of the Railroad Company?

A. No, I don't know about that.

Mr. Garnett: That's all.

Mr. Hull: I think that's all, Mr. Owen.

Witness excused. (CM 328-344.)

[fol. 212] Defendant introduced in evidence as Exhibit 19 a contract between the Choctaw, Oklahoma & Gulf Railroad Company and its lessee the Chicago, Rock Island & Pacific Railway Company, and the St. Louis-San Francisco Railway Company, on the one hand, and the City of Oklahoma City on the other hand, for the purchase by the latter of the land involved in these cases and other land for a consideration of $4,000,000, which contract was later performed by payment of the consideration named and the execution and delivery of the deeds provided for (C. M. 405-412). The deed from the Choctaw, Oklahoma & Gulf Railroad Company and the Chicago, Rock Island & Pacific Railway Company to the City conveying the land involved in both of these cases and other lands was introduced in evidence in each case by the plaintiff. See page 86 supra and page 297 infra.

Defendant introduced in evidence as Exhibit 23 a certified copy of a letter from the Commissioner of the General Land Office to the Register and Receiver at Guthrie, Oklahoma, under date of October 14, 1889. The letter is as follows (C-M. 539-541):

EXHIBIT 23

"Department of the Interior, General Land Office

Washington, D. C. Oct. 14, 1889.

"Register and Receiver,
Guthrie, Indian Ter.

"Gentlemen: Your are advised that on Sept. 18, 1889, the Hon. Secretary of the Interior approved a plat fixed by the Choctaw Coal Railway Co. showing a tract selected by said company for station purposes, situated in the S½ Section 33 Town. 12 N. Range 3 W. Oklahoma, containing [fol. 213] 13.77 acres. Said plat is approved under act of February 18, 1888, and is subject to all the conditions and limitations imposed by said act.

"I transmit herewith a copy of said plat upon receipt of which you will proceed under the usual instructions in such cases.

"Very respectfully, Lewis A. Groff, Commissioner."

In the certificate by the President of the Choctaw Coal and Railway Company, attested by its Secretary, to the plat attached to the foregoing letter appears the following statement:

"That the Company has selected no other grounds, upon public or Indian lands for similar purposes within the section of ten miles for which this selection is made, and that the Company by resolution of its board of directors passed on the 25th day of June, 1889, directed the proper officers to present said plat for the approval of the Secretary of the Interior in order that the Company may obtain the use of the grounds described under said Act approved February 18, 1888, and the Act of March 3rd, 1875."

The station grounds shown on the plat referred to in the above letter are the same as shown on the map at page 158 supra and marked "Station" thereon.

It was stipulated by counsel that Halifax Station mentioned in the Act of February 13, 1889, was located where the present town of Goodwin is on the Santa Fe Railroad in Ellis County, Oklahoma, and that Tobucksey County in the Choctaw Nation mentioned in that act, was approximately the present location of Hartshorne or Haileyville, in Pittsburg County, Oklahoma.

[fol. 214] Defendant rested its case (C-M. 414).

In rebuttal plaintiffs introduced a copy of the bill passed by Congress entitled:

"A bill to authorize Oklahoma City, in Oklahoma Territory, to issue bonds to provide right of way for the Choctaw Coal and Railway Company through said city." (C. M. 415-416.)

Also the report of the Committee on Territories of the House of Representatives made on December 11, 1890, reporting out the bill for passage (C-M. 416-418). The pertinent part of this committee report is as follows:

"The bill provides for the issue of bonds by Oklahoma City for the purpose of providing a right of way for the Choctaw Coal and Railway Company through said City. The bonds are made payable in not less than ten or more than twenty years, at 5 per cent per annum, and are not to exceed in amount the sum of $40,000.

"It appears from the facts presented to the committee that the Choctaw Coal and Railway Company, to which a right of way has been granted by act of Congress to construct its road through the Indian Territory, was located diagonally across the present townsite of Oklahoma City, previous to the settlement on said site on the 22nd of April, 1889.

[fol. 215] "Under the decision of the Supreme Court of the United States in what is claimed to be a parallel case (U. S. 103, p. 426), the railroad company claims that it has a superior title to the right of way through said city, though the ground claimed was at once platted into lots and blocks by the townsite settlers immediately after 12 o'clock m. on the 22nd of April, 1889, and has been mostly covered with substantial improvements, consisting of business houses, hotels, private residences and manufacturing establishments.

"It appears that these townsite settlers believed, and were so advised, that the rights of the railroad did not attach until the map of definite location was filed in the department of the interior, which did not occur until the 13th of July 1889. In this state of affairs it is found to be impossible to adjust the controversy between the railroad company and the townsite settlers, without such delay in litigation as will defeat the construction of the road within the time required by law.

"As a practical solution of this difficulty, and with the unanimous consent of the people of the city, it has been agreed between the city authorities and the railroad company that the road may pass directly through the city on regular surveyed lines, corresponding to the streets and alleys, and it is for the purpose of paying for the property necessary to be purchased that this legislation is asked.

"The road is now in course of construction and will soon be up to the city limits.

"The committee recommend the passage of the bill."

(House Reports, 51st Congress, Vol. 1, Report No. 3279.)

Plaintiffs introduced pages 1079 et seq. of the Congressional Record, Part 2, Vol. 22, 51st Congress, Second Session, showing the proceedings of the House of Representatives on Friday, January 9, 1891, with respect to debate on the bill in question (C-M. 420-430). The pertinent part of this debate is as follows, Mr. Harvey being the delegate in Congress from Oklahoma Territory:

"Mr. Harvey: Mr. Speaker, ever since the town of Oklahoma City was started there has been a controversy between the people of that city and this railroad company. Under the decision of the Supreme Court, the railroad com- [fol. 216] pany is now entitled to a right of way through the city 300 feet wide, running through the business and residence portion of the city, which is entirely built up. The object of this bill is to adjust the right of way difficulty with the railroad company, to give them a street and two blocks of land in lieu of the right of way which they are to surrender. The persons owning the property surrendered, who are to be benefitted by this adjustment, are to contribute in part, and the general public in part. If this arrangement is not carried out, the railroad company,

under the decision of the Supreme Court of the United States, can tear through the improvements and mutilate the city in a way that we do not want to have done. This is a matter that could be arranged in any city in the gentleman's district by a meeting of the city council in half an hour, but we are compelled to come to Congress for it.

"Mr. Anderson of Kansas: I would like to inquire of the gentleman whether these bonds authorized in this bill are to be given to the railroad company or the owners of this property.

"Mr. Harvey: The bonds are to be given to the owners of the property to compensate them for the loss of their improvements. The railroad is to have nothing whatever to do with the handling of this money. It is not for the purpose of paying the railroad company; it is to pay the parties whose improvements are taken for the new right of way.

"Mr. Anderson of Kansas: How long has that city been there and what is its population?

"Mr. Harvey: It is about two years old. The population is about 6,000.

"The Speaker: Is there objection to the present consideration of this bill? (A pause.) The Chair hears none.

"Mr. Cannon: Mr. Speaker, as there is no objection, I would like to know the amount of these bonds that are proposed to be issued.

"Mr. Harvey: Not to exceed $40,000, whatever amount is necessary to pay the owners of property whose improvements are taken in this way. That is what the money is intended for, and it is to be used for no other purpose but to compensate these parties for the loss of their improvements. It is not to go to the railroad company at all. It will take about $75,000 altogether to pay for these improvements, but part of it is to be met by individuals.

[fol. 217] "Mr. Cannon: In other words, it is proposed to give this railroad company a right of way through this city and to bond the city to pay for it?

"Mr. Harvey: No sir; nothing of the kind. The railroad company already has a right of way running in an angling direction through the city. The Supreme Court has held that the right of way has attached, and the railroad company has not the right to enforce it.

"Mr. Anderson of Kansas: How did the railroad company acquire this right of way?

"Mr. Harvey: By an act of Congress.

"Mr. Struble: Mr. Speaker, this bill was reported from the Committee on Territories by the gentleman from Ohio (Mr. Morey), and I think it might be well for the House to hear him on this subject.

* * * * * * *

"Mr. Morey: Mr. Speaker, this Bill comes before the House upon a unanimous report of the Committee on Territories. It authorized the City of Oklahoma to issue bonds not exceeding $40,000 in amount for the purpose of adjusting the right of way of the Choctaw Coal and Railway Company through the City of Oklahoma. It seems that this railway company, under a grant from the Congress of the United States, had laid its route diagonally over the territory now occupied by the City of Oklahoma, but it had not been definitely surveyed or established.

"Mr. Anderson of Kansas: When was this grand made and had the company located its line prior to the establishment of the city?

"Mr. Harvey: It had been located.

"Mr. Morey: Prior to the founding of the City of Oklahoma, the route had been laid out, but had not been definitely surveyed, and under a decision of the Supreme Court that the company's right attached——

"Mr. Anderson of Kansas: Had any location whatever been made?

"Mr. Morey: It is held under the decision of the Court that the right of the company attached where the route finally should be located and surveyed.

"Mr. Anderson of Kansas: But had the company surveyed and located any line whatever?

[fol. 218] "Mr. Morey: I understand not.

"Mr. Anderson of Kansas: Then, this is a 'game of grab' on their part.

"Mr. Morey: Under the decision of the Supreme Court it is held that the right attached to the route which may be finally located by the railroad company.

"Mr. Harvey: If the gentleman will permit me, the fact is that the survey had been made, but no report filed with the interior department of a definite location. The line was marked through the city.

"Mr. Anderson of Kansas: Had stakes been driven and the line marked?

"Mr. Harvey: Yes, sir.

"Mr. Morey: Under this state of facts parties went on and selected lots. The laying out of the city was completed. Lot occupants have erected improvements upon their lots and now a conflict arises between such occupants and the railroad company. The route as finally located would go diagonally through the City of Oklahoma. The delagate from that territory (Mr. Harvey), who resides in the City of Oklahoma, comes here and shows that it is the wish of the people of the city that this matter be adjusted between the railroad and those who have improved these lots without litigation and by giving to the railroad company a straight line instead of a diagonal line through the city.

"Mr. Oates: Does this Bill authorize the City of Oklahoma to issue bonds for the purpose of adjusting the right of way through that city?

"Mr. Morey: That is the purpose. This Bill authorizes the City of Oklahoma to issue bonds to the amount of $40,000, for the purpose of adjusting this right of way.

"Mr. Oates: The Government of the United States will not endorse these bonds or be at all liable for them?

"Mr. Perkins: Not in any way.

"Mr. Oates: All right.

"Mr. Anderson of Kansas: I would like to know what was the width of this original right of way?

"Mr. Morey: I am not able to answer.

"Mr. Harvey: Three hundred feet.

[fol. 219] "Mr. Morey: The object of this Bill is to do away with the right of way claimed by the company and to purchase another right of way which will be more convenient to the city by creating less obstruction, and will at the same time settle this controversy between the railroad company and the owners of these lots.

"Mr. Anderson of Kansas: I wish to ascertain one fact in this connection. As I understand from my friend who stands beside me (Mr. Harvey) the right of way granted to the company under the Act of Congress has a width of 300 feet. According to the statements made here, the company, under a decision of the Supreme Court can claim right of way for 300 feet through that city. Now, what is the proposition which the company makes as to the width

of the right of way which they will take provided this Bill becomes a law?

"Mr. Morey: The proposition, as I understand, is this: That the railway company shall surrender its claim to the original right of way and accept another suitable and adequate right of way, to be secured by the use of these bonds, which will not exceed in amount $40,000.

"Mr. Anderson of Kansas: This new right of way, I am informed, is to be 80 feet wide.

"Mr. Harvey: Yes, sir, running along a street.

"Mr. Anderson of Kansas: Anything else?

"Mr. Harvey: And for depot purposes the company proposes to acquire two blocks of ground now covered with buildings, which we propose to remove.

"Mr. Anderson of Kansas: In this Bill, then, the company obtains a compromise under which the right of way 300 feet wide will be surrendered?

"Mr. Harvey: They surrender all claim to that right of way.

"Mr. Morey: I will only add, Mr. Speaker, that this proposition, before finally taking effect, is to be submitted to a vote of the people of Oklahoma City. (Cries of vote! vote.) The question being taken, the amendment to the amendment was agreed to, and the amendment as amended was adopted. The Bill as amended was ordered to be engrossed and read a third time; and being engrossed, it was accordingly read the third time and passed.

"Mr. Morey: Moved to reconsider the vote by which the Bill was passed; and also moved that the motion to reconsider be laid on the table.

[fol. 220] "The latter motion was agreed to." (C-M. 422-429.)

Plaintiffs introduced the veto message of President Harrison upon returning the bond bill to the House of Representatives without his approval. Congressional Record, Volume 22, Part 2, 51st Congress, Second Session, pages 1873-1874. This message is in full as follows:

"To the House of Representatives:

"I return herewith, without my approval, the Bill (H. R. No. 12365) entitled:

"'An Act to authorize Oklahoma City, in Oklahoma Territory, to issue bonds to provide a right of way for the

Choctaw Coal and Railway Company through said city.' This bill authorizes the corporation of Oklahoma City to issue corporate bonds to the amount of $40,000, for the purpose of providing a right of way for a railroad company through the city, if the proposition shall receive the assent of the majority of the legal voters at an election to be called for that purpose.

"It is attempted to distinguish this case from the ordinary case of a municipal grant to a railway company by the fact that this railway had located its lines through the land afterwards settled upon under the townsite law before such settlement, and that the route thus located cuts the plat of the city diagonally and in a way to be very injurious to property interests.

"Upon an examination of the facts, it appears to me to be clear that no legal location was made by the railway company prior to the acquisition of the land by occupying settlers. Some preliminary surveys had been made, but no map of location had been filed with the Secretary of the Interior. If the rights of this company at this point of its road as to the right of way, are derived from the general statutes of the United States upon that subject (Revised Statutes, supplement page 187), then Section 4 distinctly saves the right of any settler who had located prior to a filing of the profile of the road and the approval by the Secretary of the Interior thereof. And, if, on the other hand, the rights of the company at the point indicated were derived from the Act of Congress of February 18, 1888, 'to authorize the Choctaw Coal and Railway Company to construct and operate a railway through the Indian Territory and for other purposes' Section 6 of that Act plainly protects the right of any occupying claimant. The latter statute, it seems to me, was intended to grant a right of way [fol. 221] only through Indian lands, and if these lands were not such, the general statute to which I have referred would apply; but in either event the conclusion is the same.

"It appears from the report of the committee that its favorable action, and I must assume, the favorable action of Congress, proceeded upon the theory that there was a real controversy, doubtful as to its issue, as to the right of the railroad company to hold the line of its survey through the city. Stripped, then, of this claim, the proposition is nakedly one to authorize Oklahoma City to donate

$40,000 to the Choctaw Coal and Railway Company. The general statutes of the United States prohibit such grants, and this must stand, until repealed, as a continuing expression of legislative opinion. If a departure from this rule is allowed at all, certainly it should only be where the circumstances are exceptional. Such circumstances, in my opinion, do not exist in this case. Already I have received from other cities in the territory, protests against special legislation of this sort, accompanied by the suggestion that if this policy is admitted other cities shall also be allowed to encourage the building of roads by donation.

"Oklahoma City, according to the report of the census office, has a population of about 4,100, and this donation would be equivalent to nearly $10 per capita. Very little real estate, whether townsite or country property, in this territory is yet subject to assessment for taxation. The people have not yet had time to accumulate, and Congress has received appeals for aid to relieve a prevailing distress which the territorial authorities have found themselves unable to deal with. It does not seem to me, in view of all these facts, that the wholesome rule prescribed by the general statutes should be departed from.

"Executive Mansion, January 26, 1891.

"Benj. Harrison." (C-M. 431-434.)

Upon receipt of the veto message by the House of Representatives it was referred with the bill to the Committee on Territories (C. M. 434-438) and died there.

Plaintiffs introduced the oral testimony of W. H. Ebey.

He now lives at Ada, Oklahoma. On April 22, 1889, he arrived in Oklahoma City at 2:05 p. m. on the first train in from the south. He first staked a lot right on the corner of [fol. 222] Grand Avenue and Santa Fe Streets, then went on up Broadway to the hill, where the Baptist Church at Third and Broadway was afterward located, and staked a lot west of there, between Broadway and Robinson. He was not over 10 or 15 minutes getting up there after he got off the train. There was an immense crowd all over the townsite staking lots. All of the lots in the townsite were staked that day. In a few days some of the citizens gathered together and discussed the matter of a government, and the general opinion was that some form of government should be established and upheld. So a regular election was held, and city officials, consisting of mayor, recorder,

city attorney, etc., were elected. This was a purely voluntary organization without any authority of law, but it was acquiesced in by the people. Under this city government provision was made for recording transfers of platted property. J. C. Blackburn, as city recorder, issued certificates to the occupants of lots on the townsite and transfers of lot rights were made by quit-claim deeds and lot certificates, which were filed for record in the city recorder's office. A plat of the townsite was filed in this office. This was the Chamberlain survey, also known as the Seminole survey, from the alley between Grand Avenue and Main Street to the north line of the quarter section at Seventh Street, and was the one later adopted by the townsite trustees appointed under the townsite act of 1890. From the alley between Grand Avenue and Main Street to the south other surveys were adopted (C-M. 439-444).

[fol. 223] He was familiar with the controversy between lot claimants and the Choctaw Railway Company over which had prior right to the right of way as surveyed and staked by the company before the opening, and as secretary of a citizens board, organized similar to a chamber of commerce, he took the matter up with Mr. Chadick, general manager of the company. The company wanted to go through the alley between First and Second Streets and take 40 feet off the back end of each side, but except for a few public spirited men the lot owners were unwilling and refused to give up any of their ground. They wouldn't budge and wouldn't do anything, and it finally resulted in the citizens raising a fund to reimburse the occupants of those lots for the ground that was needed for that right of way.

The company's proposition was to have a right of way 100 feet wide down the alley between First and Second Streets, with 40 feet off the back end of each of the lots on each side, and the citizens undertook to acquire that for them and did so. They worked with Mr. Chadick to get the line through on that alley. He was worried quite a bit about getting through and didn't want to miss the town, but wanted to go through it if he could, and so agreed to accept that right of way if the citizens could get it for him, and they proceeded to raise the money and pay the lot owners who demanded payment for their deeds. The citizens obtained a donation of the necessary ground for the right of way where they could get it, and bought it from those who would not donate. In an endeavor to rush the matter a bond

[fol. 224] was prepared and signed by a number of citizens, including the witness, guaranteeing payment to the lot owners of all damages for the taking of their land for a right of way, the amount to be determined by arbitrators or by commissioners in condemnation proceedings. The citizens on the lots covering the proposed right of way did not take the company's claim to a right of way very seriously, didn't pay any attention to it, and didn't think the company had any legal rights at all. The principal ground on which they based their denial of any right in the company was that no map of definite location of the proposed right of way had been filed as the law required before they took their lots (C-M. 444-440).

Plaintiffs introduced the oral testimony of Dr. A. C. Scott.

He lives in Oklahoma City and has since April 22, 1889. He arrived at Oklahoma City in an official capacity by train shortly after midnight on April 22, 1889. He was familiar with the Chamberlain townsite survey and understood that it had already been made and a blue print plat prepared prior to the opening. At noon on that day Mr. Chamberlain began to run the lines and drive stakes and lay out the plat on the ground. He surveyed and staked the lots, blocks, streets and alleys as they now exist in Oklahoma City north of the alley between Main Street and Grand Avenue, just as Mr. Ebey had testified. This plat was the one later adopted by the townsite trustees. South of that alley other surveys were approved. These different surveys were first approved by various committees and citizens' meetings. [fol. 225] The witness was chairman of the first two public meetings held in the city. He was later appointed a member of the board of townsite trustees, being appointed late in 1890 or early in 1891, succeeding Edgar N. Sweet (C-M. 450-455).

He was familiar with the controversy that existed from the opening until in 1891 between lot claimants and the Choctaw Railway Company as to its claim of a right of way. Delegate Harvey introduced a bill in Congress authorizing the city to vote $40,000 in bonds to pay for a right of way through the city, and it passed Congress, but was vetoed by President Harrison early in 1891. The right of way as proposed to be purchased with this fund was located along the alley between First and Second Streets, and

parallel to the boundary lines of those streets. After the bill was vetoed the people undertook, with the consent of the railway company, to raise by public subscription the money necessary to pay for the ends of the lots needed on each side of the alley, which was somewhere between $20,000 and $30,000. The witness, with others named, were members of the soliciting committee and at a meeting in March, 1891, found they had collected a little over $11,000. It seemed impossible to collect more and a proposition was made that the saloon licenses be raised as high as the traffic would bear and half of this paid into the railroad right of way fund. But to get the money in this way would require several months, so scrip was issued against it, which floated immediately almost at par. To secure this and give it standing what was called the Choctaw bond was made and signed by a number of citizens guaranteeing the payment of it. [fol. 226] There were 157 persons signed this bond, including nearly every substantial citizen in town. By reason of the scrip being receivable in payment for half of a saloon license and secured by the Choctaw bond it floated near par and in that way the citizens raised the rest of the amount necessary to pay the owners for the portions of their lots taken. The prices or damages to be paid were fixed by a committee of appraisers whose report was made the basis of settlement with the lot owners. The witness was on the soliciting committee for funds, but not on the railroad committee proper and did not know what agreement was reached between that committee and the company, but did know that the railroad was built through on the right of way that the citizens acquired for it. He was acquainted with T. C. Sears, attorney for the railroad (C-M. 450-461).

On cross-examination counsel for defendant read from an Oklahoma City newspaper, dated January 9, 1890, a part of what purported to be a report of a citizens' committee of which the witness was a member, stating that Mr. Chadick of the Company had been interviewed and had said that any modification of the located right of way would be impracticable, and:

"That the company was advised by eminent lawyers, and among them Ex-Governor Fletcher of Missouri, that the right of way through Oklahoma City is perfectly valid; that they do not claim under any general law, but under the special Act of Congress of 1889; that said Act is a grant in præsenti; that it attached on the locating of the right

of way by survey and not at date of filing plat with the Secretary of the Interior, said filing when made relating back to the time of locating the line of survey."

[fol. 227] Witness said that was a correct statement of their report and of Mr. Chadick's position as he remembered it (C-M. 462).

On re-direct examination witness said that while the matter just read was a correct statement of the company's contention, on the other hand the lot claimants contended that the Act of Congress was not a grant in præsenti and that the company's right would not attach until it had filed its location map and that their rights were prior and superior to its right (C-M. 463).

This closed the oral testimony.

Plaintiffs introduced a certified copy of letters patent from the United States to the Muskogee or Creek Tribe of Indians, dated August 11, 1852, and recorded in Volume 4 of Records of Indian Deeds, in the office of Indian Affairs, pages 446-447 (C-M. 464-467), which conveyed the territory described in the treaty with the Creeks of February 14, 1833.

Plaintiffs introduced the court files in case No. 212, begun on April 7, 1891, in the District Court of Oklahoma County, Territory of Oklahoma, entitled "In the Matter of the Condemnation of a Right of Way by the Choctaw Coal and Railway Company." It was stipulated by counsel that the petition in this condemnation proceeding was missing from the files, and counsel on each side had been unable to locate it, and that when counsel for defendant first saw the files, about three years prior, there was no petition in them at that time, and that apparently it had been lost (C-M. 470).

These court files begin with a motion and affidavit for service by publication upon certain defendants (C-M. 471), [fol. 228] made by T. C. Sears, attorney for the Choctaw Coal and Railway Company, reciting that the persons named therein were property owners, as indicated in the petition filed, on the right of way designated by said company through the City of Oklahoma City, and that they were non-residents and personal service could not be had upon them in the Territory of Oklahoma.

The files show that the case proceeded to the point where commissioners were appointed to assess damages to the lot

owners and that these commissioners made a series of reports, in which they listed the description and quantity of land to be taken, the name of the owner and amount of damages awarded. The lots crossed by the right of way as actually taken are included in this list. A part of this exhibit consists of a statement of account by the court clerk showing the amounts of money deposited with him and the amounts paid out in the proceeding. A recapitulation of this account under date of July 24, 1891, shows the amount deposited by citizens to the credit of the clerk, the amount checked out for deeds and services, and the balance then on deposit to the credit of the clerk. (C-M. 525-527.)

These condemnation proceedings were duly instituted and carried to the point of the assessment of damages by commissioners and then right of way deeds in the form already set forth herein were obtained from the lot owners who were either paid therefor directly by the citizens' committee or were paid out of funds deposited by the committee with the court clerk for that purpose.

[fol. 229] The plaintiffs rested in rebuttal (C-M. 537).

Both sides rested and the evidence was closed (C-M. 542).

Thereupon the case was argued orally to the court and written briefs were submitted and the court took the matter of his decision and judgment therein under advisement. (C-M. 546.)

And thereafter on the 9th day of January, 1932, the case again came on for decision and judgment of the court and thereupon the court announced and rendered a decision and judgment for the defendant. (C-M. 547.)

And thereafter, on the 11th day of January, 1932, there was filed in said cause, by the Court Clerk of said Court, a "Motion for New Trial"; a full, true and correct copy of the same, together with all endorsements on the back thereof, being in words and figures as follows, to-wit:

[fol. 230] IN THE DISTRICT COURT OF OKLAHOMA COUNTY

[Title omitted]

MOTION FOR NEW TRIAL—Filed Jan. 11, 1932

Come now the plaintiffs in the above entitled action and move and ask the court to vacate and set aside the former

decision of the court made and rendered in this action on the 9th day of January, 1932, and to grant these plaintiffs a new trial of this action for the following causes which affect materially their substantial rights.

1. For irregularity in the proceedings of the court and of the defendant and for abuse of discretion on the part of the court by which the plaintiffs were prevented from having a fair trial.

2. For misconduct of the defendant.

3. For accident and surprise which ordinary prudence on the part of the plaintiffs could not have guarded against.

[fol. 231] 4. For that the said decision of the court is not sustained by sufficient evidence.

5. For that the said decision of the court is contrary to law.

6. For newly discovered evidence material to these plaintiffs which they could not with reasonable diligence have discovered and produced at the trial.

7. For error of law occurring at the trial and excepted to by these plaintiffs at the time.

(Signed) Henry L. Goddard, (Signed) Fred Ptak,
(Signed) Chas. H. Garnett, Attorneys for Plaintiffs.

[File endorsement omitted.]

[fol. 232] And thereafter on the 21st day of January, 1932, the cause again comes on for hearing on the motion of the plaintiffs for a new trial, and the court, having heard the argument of counsel thereon and considered the same, orders that said motion be overruled, to which the plaintiffs except and in open court give notice of appeal to the Supreme Court and ask and are given time in which to make and serve case-made for their appeal (C-M. 550).

And thereafter on the 23rd day of January, 1932, there was filed in the cause and recorded on the journal of the court the decision and judgment of the court and its order

overruling plaintiffs' motion for new trial and allowing their appeal and a record of the proceedings for such appeal all in the words and figures as follows, to wit (C-M. 551-556):

[fol. 233] IN THE DISTRICT COURT OF OKLAHOMA COUNTY

[Title omitted]

JOURNAL ENTRY OF JUDGMENT—Jan. 23, 1932

On the 14th day of September, 1931, being one of the regular court days of the September, 1931 term of this court, this cause comes on for trial in its regular order. The plaintiffs appear in person and by Henry L. Goddard, Fred Ptak and Chas. H. Garnett, their attorneys. The defendant appears by Albert L. McRill, its Municipal Counselor, and A. L. Hull, its Assistant Municipal Counselor. Both plaintiffs and defendant announce ready for trial.

Thereupon, trial by jury is waived in open court and all parties consent and agree that the court shall try the cause and make decision and render judgment therein without the intervention of a jury.

Thereupon, the trial is begun and all the evidence on the part of the plaintiffs and defendant, respectively, is intro-[fol. 234] duced and the argument of counsel is heard, and at the conclusion thereof, the court takes under advisement the matter of decision and judgment.

On the 9th day of January, 1932, being one of the regular court days of the January 1932 term of this court, this cause again comes on for decision and judgment by the court. The parties appear as upon the trial.

Thereupon, the court, having heard all the evidence and the argument of counsel, and being fully advised in the premises, announces and makes decision and judgment in the case.

The Court finds the issues for the defendant and finds that judgment should be that the plaintiff take nothing by the action and that the defendant have judgment for its costs, and judgment on its cross-petition.

The Court holds, as a matter of law, that the Act of Congress of February 18, 1888 (25 Stats. 35) together with the Acts amendatory thereof, was a present absolute grant of the land here involved for right of way and station grounds

to the Choctaw Coal and Railway Company, vesting the fee title to said land in said Company immediately upon the enactment and approval of said Act, with a possibility of reverter in the United States; and that the patent purporting to convey to the township trustees named therein the whole of the Southeast Quarter (SE ¼) of Section Thirty-three (33), in Township Twelve (12) North, Range Three (3) West, of the Indian Meridian, was ineffective to convey to said trustees any title to the land within the boundaries of the right of way of said Company across said quarter [fol. 235] section as and when located and that, therefore, the said right of way having been located in conformity to said Act, so as to include all the land involved in this action, neither the plaintiffs, nor any persons through whom they claim to have derived title under said patent, now have, or have ever had, any sort of right or title whatsoever to said land.

The Court holds further, as a matter of law, that the land included within the boundary lines of said right of way, as the same should thereafter be and was thereafter located, was, by the Act of Congress aforesaid, appropriated to a lawful use and thereby severed from the public domain of the United States, and was never thereafter subject to preemption, homestead or townsite entry, and that the Land Department of the United States had no authority, after the enactment of said Act, to grant any title to said land to any person.

The Court further holds, as a matter of law, that upon abandonment for railway purposes of said land within the boundaries of said right of way and station grounds, title to said land revested in the United States, and upon entry of the decree of the United States District Court for the Western District of Oklahoma finding such abandonment, that the title to said land immediately vested in the City of Oklahoma City, a municipal corporatiion, by virtue of the Act of Congress of March 8, 1922 (42 Stats. 414).

It is, therefore, considered, ordered and adjudged by the court that the plaintiffs take nothing by this action, and that their petition here be, and it is hereby dismissed and that all costs of the action be, and they are hereby taxed and adjudged against the plaintiffs.

[fol. 236] It is further considered, ordered and adjudged by the Court that the City of Oklahoma City, a municipal

corporation, is vested with the absolute fee simple title to the land involved in this action described as follows:

Forty (40) feet off the north end of Lot No. Six (6) in Block No. Thirty-six (36) in the original townsite of said city of Oklahoma City, according to the recorded plat thereof, and a strip of land ten (10) feet wide across and adjoining the north end of said Lot Six (6), being one-half (½) of the alley twenty (20) feet wide extending east and west through said block as laid out, and designated on said plat, where and as the said alley adjoins the north end of said Lot Six (6), subject only to the reservations contained in the Act of Congress of March 8, 1922, aforesaid (42 Stats. 414) and that such title be, and the same is hereby fully quieted in said City as against the plaintiffs herein, and all persons claiming by, through ot under said plaintiffs; and that said plaintiffs and all persons claiming by, through or under said plaintiffs, or either of them, are forever barred and enjoined from asserting claim to any title or interest to or in said land, or any part thereof.

To all of which findings, decision and judgment of the Court the plaintiffs at the time excepted, and their exception is allowed.

Thereafter, and on the 11th day of January, 1932, the plaintiffs filed herein their motion for new trial in writing. And now on this 21st day of January, 1932, the said motion of the plaintiffs for new trial comes on for hearing in its regular order. The parties appear as upon the trial of the action.

[fol. 237] Thereupon, the Court considers said motion, and having heard the argument of counsel thereon, and being fully advised in the premises, finds that the same should be overruled and denied.

It is therefore considered, ordered and adjudged by the Court that the motion of the plaintiffs in this action for new trial be, and the same is hereby overruled and denied.

To all of which findings, decision and order of the Court overruling their said motion for new trial the plaintiffs at the time except and their exception is allowed.

Thereupon, the plaintiffs give notice in open court of appeal to the Supreme Court of the State of Oklahoma from the said findings, decision, judgment and orders of the Court in this action, and requests the Court to order

and direct the Clerk to enter their said notice of appeal upon the journal and trial docket of the Court.

Thereupon, it is considered and ordered by the Court that the Clerk of this Court be, and he is hereby ordered and directed to enter of record and to spread upon the trial docket and journal of this Court the said notice of appeal of the said plaintiffs in the manner provided by law.

Thereupon, the plaintiffs request an extension of time in which to make and serve case-made for appeal herein. And the Court finds that for good cause shown, the time fixed by statute for making and serving case-made for appeal herein should be extended to sixty days from this date.

It is, therefore, considered and ordered by the Court that the plaintiffs herein be, and they are hereby granted sixty days from this date in which to make and serve case-made [fol. 238] for appeal herein, and that the defendant be, and it is hereby granted three days thereafter in which to suggest amendments thereto, and that the same may be settled and signed upon three days' notice in writing by either party.

(Signed) Lucius Babcock, Judge.

O. K.: (Signed) Chas. H. Garnett, Attorney for Plaintiffs.

O. K.: (Signed) A. L. Hull, Asst. Municipal Counselor, Attorney for Defendant.

[File endorsement omitted.]

[fol. 239] Thereafter a casemade for appeal in said cause was duly prepared, served, settled and signed, filed in the trial court, withdrawn, attached to a petition in error and filed with said petition in error in the Supreme Court of Oklahoma, all in the time and manner provided by law, the said petition in error being as follows, towit:

[fol. 240] [File endorsement omitted]

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

No. 23821

GEORGE NOBLE and WILLIAM NOBLE, Plaintiffs in Error,

vs.

THE CITY OF OKLAHOMA CITY, a Municipal Corporation, Defendant in Error

PETITION IN ERROR—Filed July 6, 1932

The Plaintiffs in Error, George Noble and William Noble, complain of the Defendant in Error, the City of Oklahoma City, a municipal corporation, that it recovered a judgment in the District Court of Oklahoma County, in the State of Oklahoma, against the plaintiffs in error above named in a cause pending in said court wherein the said plaintiffs in error were plaintiffs, and the said defendant in error was defendant, and being cause No. 66,726, in said court, at the January, 1932, Term of said court, on the 9th day of January, 1932, and for that the said court on the 21st day of January, 1932, and at the same January, 1932, Term, denied and overruled the motion of the said plaintiffs in error to vacate and set aside said judgment theretofore recovered by the said defendant in error in said action and to grant the said plaintiffs in error a new trial in said action.

To all of which judgment, order and action of said court the plaintiffs in error reserved exceptions, and in all of [fol. 241] which there was manifest error on the part of said court.

And upon the over-ruling of their said motion for new trial as above stated, the plaintiffs in error gave notice in open court of appeal to the Supreme Court of the State of Oklahoma from the said findings, decision, judgment and orders of the court in the said action, and requested the court to order and direct the clerk to enter their said notice of appeal upon the journal and trial docket of the court, and thereupon the court did so order.

And now the original casemade of the proceedings of said court in said cause, duly served, signed, certified,

attested and filed in said court in said cause, is hereto attached, marked Exhibit A, and made a part of this petition in error.

The said plaintiffs in error aver that there was and is manifest error in the proceedings had by said court in said cause and in the said judgment and orders made and entered therein in this, towit:

1. That the order and judgment of the said court denying and over-ruling the said motion of plaintiffs in error for new trial was and is erroneous and contrary to law.

2. That the findings, decision and judgment of the court in said cause was and is erroneous because not supported by the evidence.

3. That the findings, decision and judgment of the court in said cause was and is erroneous because it is contrary to the evidence.

[fol. 242] 4. That the findings, decision and judgment of the court in said cause was and is erroneous because it is contrary to the law.

5. That the said court erred in not rendering judgment upon the trial of the cause for the plaintiffs in error as prayed for by them.

6. That the said court erred in that its said decision and judgment are not supported by, but are contrary to, its findings of fact.

7. That the said court erred in admitting incompetent, irrelevant and immaterial evidence upon the trial on behalf of the defendant in error, over the objection of the plaintiffs in error.

8. That the court erred in excluding competent, relevant and material evidence offered on behalf of the plaintiffs in error upon objection by the defendant in error.

Wherefore, the plaintiffs in error pray that the said order and judgment of the court made and rendered on the 21st day of January, 1932, over-ruling and denying their said motion to vacate and set aside the said judgment rendered therein on the 9th day of January, 1932, and to grant them a new trial in said action, be reversed, set aside and held for naught, and that the said judgment rendered on the 9th

day of January, 1932, against the said plaintiffs in error also be vacated, reversed, set aside and held for naught, and that the said court be ordered, directed and commanded to enter judgment in said cause for the plaintiffs in error for the relief prayed for in their petition in said [fol. 243] cause, or to grant the plaintiffs in error a new trial upon the issues joined in said cause.

Henry L. Goddard, Fred Ptak, Chas. H. Garnett,
Attorneys for Plaintiff in Error.

[fol. 244] At this stage of the record and proceedings in the case of Nobel et al., vs. City of Oklahoma City, No. 23,821, in the Supreme Court of Oklahoma, it was consolidated with the case of Higgins et al. vs. City of Oklahoma City No. 23,822, in said Court, and the further record and proceedings in it is a consolidated record and proceedings in the two cases. The record and proceedings in the Higgins case down to its consolidation with the Noble case follows here.

[fol. 245] Pleadings and Proceedings in the District Court of Oklahoma County, in the State of Oklahoma, in the case of Robert W. Higgins, Jr., John T. Higgins, Raleigh E. Higgins, Burford C. Higgins, Estella Jones nee Higgins, Cass W. Higgins, an Insane Person, by Jack Jones, his Next Friend and Duly Appointed, Qualified and Acting Legal Guardian, Eva H. McMillan, Fairy Adkins, Gertrude Koelsch nee Higgins, and Nellie Shannon nee Higgins, plaintiffs, vs. The City of Oklahoma City, a municipal corporation, defendant, No. 66,314, and in the same case in the Supreme Court of the State of Oklahoma, in which the plaintiffs above named were plaintiffs in error and the defendant above named was defendant in error, being No. 23,822 in said court.

[fol. 246] [Caption omitted]

[fol. 247] STATE OF OKLAHOMA,
Oklahoma County, ss:

IN THE DISTRICT COURT IN AND FOR THE SAID COUNTY AND STATE

No. 66314

ROBERT W. HIGGINS, JR., JOHN T. HIGGINS, RALEIGH E. HIGGINS, Burford C. Higgins, Estella Jones nee Higgins, Cass W. Higgins, an Insane Person, by Jack Jones, His Next Friend and Duly Appointed, Qualified and Acting Legal Guardian, Eva H. McMillan, Fairy Adkins, Gertrude Koelsch nee Higgins, and Nellie Shannon nee Higgins, Plaintiffs,

vs.

THE CITY OF OKLAHOMA CITY, a Municipal Corporation, Defendant

PETITION—Filed Dec. 5, 1930

Come now the plaintiffs above named and for their cause of action against the defendant above named allege and say:

1. That the plaintiffs other than Eva H. McMillan and Fairy Adkins are children of Robert W. Higgins, Sr., now deceased, and the said plaintiffs Eva H. McMillan and Fairy Adkins are grandchildren of the said Robert W. Higgins, Sr., being the children and sole and only heirs of William H. Higgins, deceased, who died intestate in Oklahoma County, in the State of Oklahoma, on or about June 6, 1925, and who was a son of said Robert W. Higgins, Sr., and that the plaintiffs are all and the only de-
[fol. 248] scendants and heirs of the said Robert W. Higgins, Sr., deceased; that the said Robert W. Higgins, Sr., died intestate on or about the 18th day of June, 1916, in San Diego County, in the State of California, and no administration has ever been had on his estate; that the plaintiff Cass W. Higgins is insane and an incompetent person and one Jack Jones is the duly appointed, qualified and acting guardian of the estate of said Cass W. Higgins, under appointment by the County Court of Oklahoma County, in the State of Oklahoma, and he as such guardian

and as next friend of the said Cass W. Higgins, prosecutes this action for and on behalf of the said Cass W. Higgins; and that the plaintiffs other than said Eva H. McMillan and Fairy Adkins, together with said William H. Higgins, inherited in equal parts all the real estate which the said Robert W. Higgins, Sr., owned at the time of his death, and the plaintiffs Eva H. McMillan and Fairy Adkins, as the sole heirs of said William H. Higgins, deceased, upon whose estate no administration has ever been had, have inherited in equal parts all the real estate and all share or interest in real estate which the said William H. Higgins owned at the time of his death, including that which he inherited from said Robert W. Higgins, Sr.

2. That the defendant is now, and was at all times herein mentioned, a municipal corporation and city of the first class, created, organized and existing as such under the laws of the State of Oklahoma, and possessing all the political, governmental, legislative and corporate powers [fol. 249] granted and delegated to a city of the first class under the laws of said state.

3. That the plaintiffs are the owners in fee simple of the full title, both legal and equitable, and are entitled to the immediate possession of the following described real estate situated in Oklahoma County, in the State of Oklahoma, and within the present corporate limits of the said City of Oklahoma City, to wit:

A strip of land one hundred (100) feet wide, the northeast corner of which commences at a point on the west line and one hundred (100) feet south of the northwest corner of Lot Twenty (20), in Block Sixty-four (64), in the original plat of the City of Oklahoma City, in the County and State of Oklahoma, as the same is on file and of record in the land title records of said county, and the southeast corner of which commences at a point on the west line and one-hundred (100) feet north of the southwest corner of Lot Nineteen (19) in said block Sixty-four (64), and which extends thence for a distance in a westerly direction and thence in a northwesterly direction across the southwest quarter (SW¼) of Section thirty-three (33) in Township Twelve (12) North, range Three (3) West of the Indian Meridian in said County and State, to the west line of Shartel Street extended north, as said street is laid out

in Main Street Addition to said City of Oklahoma City ac-
[fol. 250] cording to the recorded plat of said addition, the same being the right of way as originally surveyed, laid out and taken by the Choctaw Coal and Railway Company about the year 1892, and thereafter taken, occupied and used by the Choctaw, Oklahoma and Gulf Railroad Company, as successor to said Choctaw Coal and Railway Company, and afterward occupied and used by the Chicago, Rock Island & Pacific Railway Company as lessee of said Choctaw, Oklahoma and Gulf Railroad Company, as and for a railroad right of way and for railroad purposes, the said strip of land being more particularly designated upon a blueprint plat or map thereof hereto attached, marked Exhibit A, and made a part hereof;

that the plaintiffs deraign their title to the said real estate as follows:

By patent from the United States of America to Robert W. Higgins, dated September 19, 1896, a full, true and correct copy of which is hereto attached, marked Exhibit A, and made a part hereof.

By inheritance by the plaintiffs as all of the heirs, immediate and remote, of the said Robert W. Higgins, Sr., deceased, as herein above set forth.

4. That on the 24th day of March, 1896, the said Robert W. Higgins, Sr., by the name and style of R. W. Higgins and Susan A. Higgins, his wife, executed an instrument, termed a right of way deed and release of damages, to the said Choctaw, Oklahoma and Gulf Railroad Company, conveying [fol. 251] a strip of land one hundred (100) feet wide across said quarter section, which included the strip hereinabove described, for a right of way for its railroad, telegraph and telephone lines, and for railroad or station purposes, to be held by the said Choctaw, Oklahoma and Gulf Railroad Company with all the rights and privileges which said company was authorized to have, hold and exercise under and by virtue of the Act of Congress granting the Choctaw Coal and Railway Company a right of way through the Indian Territory, approved February 18, 1888, and subsequent Acts of Congress amending and extending said Act, together with all the rights and privileges granted unto the Choctaw, Oklahoma and Gulf Railroad Company by Act of Congress approved August 24, 1894, and Act of Congress approved April

24, 1896, a full, true and correct copy of which right of way deed and release of damages is hereto attached, marked Exhibit E, and made a part hereof; and that at the time of the execution of the said deed, the said Robert W. Higgins, Sr., was the owner of the fee title absolute to all of the real estate therein described.

5. That the said strip of land first above described was occupied and used continuously for right of way and railroad purposes only, and for no other purpose, by said Choctaw, Oklahoma and Gulf Railroad Company, and by its lessee, the said Chicago, Rock Island & Pacific Railway Company from the execution of said deed, Exhibit B, to about the 4th day of December, 1930; that on or about the 17th day of Novem- [fol. 252] ber, 1927, the said Choctaw, Oklahoma and Gulf Railroad Company and the said Chicago, Rock Island & Pacific Railway Company entered into a contract whereby they agreed for a valuable consideration to convey to the defendant by a quit claim deed, all their right, title and interest in and to the real estate above described and to discontinue the use and occupation of, vacate and abandon the same for right of way and railroad business and purposes; that, thereafter, said railroad companies made application to the Interstate Commerce Commission of the United States for a Certificate of Public Convenience and Necessity granting them permission to abandon a portion of their line of railroad through the said City of Oklahoma City, described in their said application and including all the real estate above described and such proceedings were had on said application that thereafter, and on the 9th day of April, 1928, the Certificate of Public Convenience and Necessity as applied for was by said Interstate Commerce Commission granted, a full, true and correct copy of which is hereto attached, marked Exhibit D, and made a part hereof; that on or about the 4th day of December, 1928, the said Choctaw, Oklahoma and Gulf Railroad Company and the said Chicago, Rock Island & Pacific Railway Company, as its lessee, for a valuable consideration, executed an instrument of conveyance termed a quit claim deed, by which they conveyed to the said defendant all of their right, title and interest in and to the tract of land first above described, together with other lands; that there- [fol. 253] after, and on the said 4th day of December, 1930, the said railroad companies abandoned the use of said land for right of way and railroad purposes and ceased using the

same for any railroad purpose or for any purpose whatever, and took up and removed all railroad tracks therefrom and delivered possession thereof to the defendant, and thereupon the said defendant entered into possession of said real estate and ever since has retained, and still does retain, the possession thereof to the exclusion of the plaintiff therefrom; and that the said defendant in purchasing said real estate first above described and obtaining said quit claim deed from said railroad companies therefor, and in entering into possession thereof, did not intend, and does not now intend, to use the same for a railroad right of way or for any railroad or station purpose, and has not used, and is not using, and cannot lawfully use, the same for any such purpose, but intends to enclose, appropriate, convert and apply the said real estate so as to make it a public park of said city, and for public use as such park, and now holds possession of said real estate for said purpose.

6. That by the terms and provisions of said deed, Exhibit B, and the said Acts of Congress, when the said railroad companies abandoned and discontinued the use of said real estate first described above for right of way and railroad purposes and undertook to convey the same to the defendant, and the defendant took possession thereof for the purpose of converting the same into a public park as above set forth, [fol. 254] then the plaintiffs as the successors in title, by inheritance to the said Robert W. Higgins, Sr., became the owners of the fee title absolute to the said real estate free and discharged from all and whatever right and title the said railroad companies, or any of them, may at any time have had to the same or to the use thereof for right of way and railroad purposes, or for any purpose, and also became entitled to the immediate possession thereof, which the defendant now wrongfully withholds from them; that the said quit claim deed purporting to convey whatever title the said railroad companies had in the said real estate to the defendant is conclusive evidence of the abandonment of the real estate therein described for railroad purposes, but is ineffective in law to convey any right, title or interest therein, for that the said railroad companies had no right, title or interest therein which they could convey to the defendant, and the defendant did not, and could not, acquire any title, right, claim or interest in and to said real estate under and by virtue of said quit claim deed; and that the said deed from said

railroad companies to the defendant constitutes a cloud on the title of the plaintiffs in and to said real estate which they are entitled to have cancelled and removed and they are also entitled to have the title to said real estate quieted in them against all claims of the defendant.

Wherefore, the plaintiffs pray that they have and recover of and from the defendant a judgment for the possession of [fol. 255] the real estate first described above, and the ejectment of the defendant therefrom, and a further judgment quieting title to said real estate in them against the defendant and cancelling and removing the said quit claim deed from said railroad companies to the defendant as a cloud on their title thereto, and a further judgment adjudging them to be the owners of said real estate in fee simple absolute, free and clear of any and all claims of the defendant whatsoever, and perpetually enjoining and restraining the defendant from ever asserting any claim of right or title thereto or interest therein, and that they have all such further or other and different relief in the premises as shall be lawful, equitable and just.

Suits and Disney, Fred Ptak, and Chas. H. Garnett,
Attys. for Plaintiff.

[fol. 256] EXHIBIT A TO PETITION

United States to Robert W. Higgins

The United States of America, to all to whom these presents shall come, greeting:

Homestead Certificate No. 2480

Application 9660

Whereas, There has been deposited in the General Land Office of the United States a Certificate of the Register of the Land Office at Oklahoma, Oklahoma Territory, whereby it appears that pursuant to an Act of Congress approved the 20th day of May, 1862, "To secure homesteads to actual settlers on the public domain," and the acts supplemental thereto, the claim of Robert W. Higgins has been established and duly consummated in conformity to law, for the Southwest Quarter of Section thirty-three, in Township twelve North of Range three West, of Indian Meridian,

in Oklahoma Territory, containing one hundred and sixty acres, according to the official plat of the survey of the said lands, returned to the General Land Office by the Surveyor General:

Now Know Ye, That there is therefore granted by the United States unto the said Robert W. Higgins the tract of land above described:

To Have and To Hold the said tract of land, with the appurtenances thereof, unto the said Robert W. Higgins and to his heirs and assigns, forever.

[fol. 257] In Testimony Whereof, I, Grover Cleveland, President of the United States of America, have caused these letters to be made patent, and the seal of the General Land Office to be hereunto affixed.

Given under my hand, at the City of Washington, the Nineteenth day of September, in the year of our Lord one thousand eight hundred and ninety six, and of the Independence of the United States the one hundred and twenty first.

By the President:

Grover Cleveland, by M. McKean, Secretary.

Recorded, Vol. 5, page 345. E. T. Best, Assistant Commissioner and Recorder of the General Land Office ad interim.

The Territory of Oklahoma,
Oklahoma County, ss:

Entered in Numerical Index and filed for record in the Register of Deed's office of said County, this 2nd day of October, 1896, at 11 o'clock A. M., and recorded in Book 12 of Patents, on page 471.

G. A. Beidler, Register of Deeds.

[fol. 258] Exhibit B to Petition

Right of Way Deed

R. W. Higgins & Wife to Choctaw, Oklahoma and Gulf Railroad Company

Right of Way and Release of Damages

Know all Men by these Presents: That R. W. Higgins and wife of the County of Oklahoma in Oklahoma Territory, of the first part, for and in consideration of the sum of Four

Hundred Dollars paid for the use of for a wye, off the right of way of said Company, from about December, 1892, to about the year 1897, on and over the lands hereinafter described, to them paid by the Choctaw, Oklahoma and Gulf Railroad Company, of the second part, the receipt of which is hereby acknowledged, have granted, bargained, quit claimed and relinquished and by these presents do grant, bargain, quit-claim and relinquish and convey to the said Choctaw, Oklahoma and Gulf Railroad Company, party of the second part, the following described lands for a right of way for its railroad, Telegraph and Telephone Lines, and for Railroad or Station purposes, viz:

A strip of land 100 feet wide over, through and across the lands owned or claimed by the undersigned, towit: The South West Quarter of Section thirty three (33) Township twelve (12) North, Range three (3) West of the Indian Meridian in said County and Territory, said strip of land to extend 50 feet on each side of the center of the railroad [fol. 259] or track of said railroad as now located and constructed.

To have and to hold the same by the said Choctaw, Oklahoma and Gulf Railroad Company, together with all and singular the rights, privileges and appurtenances thereunto belonging and all the rights and privileges which said company is authorized to have, hold and exercise under and by virtue of the Act of Congress granting the Choctaw Coal and Railway Company a right of way through the Indian Territory, approved February 18th, 1888, and subsequent Acts of Congress amending and extending said Act together with all the rights and privileges granted unto said Choctaw, Oklahoma and Gulf Railroad Company by an Act of Congress approved August 24th, 1894, and the Act of Congress approved April 24th, 1896, and unto its successors, and assigns forever.

And in further consideration of the premises we do hereby acknowledge the receipt in full of all compensation and satisfaction for property taken and damage done by reason of the construction of said railroad including the land taken or damaged by reason of the cuts or fills made in the construction of said railroad and says "Wye."

Witness our hands this 24th day of March, A. D. 1898.

(Signed) R. W. Higgins, Susan A. Higgins.

Attest: B. D. Shear.

[fol. 260] TERRITORY OF OKLAHOMA, —
County of Oklahoma:

Before me George J. Shields, a notary public in and for said county and territory on this 24th day of March, 1898, personally appeared R. W. Higgins and Susan A. Higgins, his wife, to me known to be the identical persons who executed the within and foregoing instrument and acknowledged to me that they executed the same as their free and voluntary act and deed for the uses and purposes therein set forth.

Witness my hand and official seal the day and year above set forth.

(Signed) George J. Shields, Notary Public. (Seal.)

My commission expires Jan. 19th, 1901.

Recorded March 26th, 1898, in book 13 at page 181.

(Exhibit C to the foregoing petition is the same certificate as Exhibit D to the petition in the Noble case and appears in full at page — supra, hence is omitted here.)

[fol. 261] [File endorsement omitted.]

Upon the filing of the foregoing petition summons was duly issued out of said Court and was served on the defendant and returned into said court in manner and form as provided by law (C-M. 18-22).

[fol. 262] IN THE DISTRICT COURT OF OKLAHOMA COUNTY, STATE OF OKLAHOMA

[Title omitted]

ANSWER AND CROSS-PETITION—Filed Feb. 13, 1931

Comes now the defendant, the City of Oklahoma City, and for answer says:

I

That it denies each and every material allegation contained in plaintiffs' petition not hereinafter specifically admitted.

II

And for further answer defendant says:

1. That defendant has no knowledge as to whether or [fol. 263] not the facts set forth in Section I, of plaintiffs' petition are true and correct as stated, and defendant, therefore, specifically denies each and all of said allegations.

2. That it admits that it is a duly organized municipal corporation and a city of the first class, under the laws of the state of Oklahoma, and possesses all the political, governmental, legislative and corporate powers delegated to a city of the first class as alleged in plaintiffs' petition.

3. (a) That it denies that the plaintiffs are the owner in fee simple of the full title both legal and equitable in and to the land described in plaintiffs' petition and further specifically denies that the defendant wrongfully detains the possession of said land from plaintiff and that plaintiff is entitled to immediate possession thereof.

(b) Defendant has no knowledge as to whether or not the United States of America executed a patent dated September 18, 1896, broad enough in its terms to convey to the said Robert Higgins, Sr., the land described in plaintiff's petition, and, therefore, defendant specifically denies that such a patent was executed and delivered. But defendant avers that if such a patent was executed and delivered, as described in plaintiffs' petition, a copy of which is set forth as Exhibit "A" thereto, which is not admitted but is hereby expressly denied, the said Robert Q. Higgins, Sr., took no title to said land described in plaintiffs peti- [fol. 264] tion or any part thereof, and in this connection alleges that long prior to the date of execution and delivery of said patent, the land involved in this suit and alleged to have been included in said patent, had been granted by Acts of Congress of the United States to the Choctaw Coal and Railway Company, a corporation, as a right of way for a railroad line to be built by said railway company. That the terms and conditions of said grant, as contained in said Acts of Congress, had been fully accepted by the said Choctaw Coal and Railway Company prior to the date of execution and delivery of said patent, and were being fully complied with by said railway company with the ap-

proval of the Secretary of the Interior and the Congress of the United States, and that said land was not public lands of the United States subject to be conveyed to the grantee in said patent or to any other person but was long prior to time of the alleged conveyance the property of the said Choctaw Coal and Railway Company. That the General Land Office had no power or authority whatsoever to convey the land described in plaintiffs' petition, or any part thereof to alleged grantee therein named, and that said patent was wholly void and of no effect and conveyed no right, title or interest in and to the said land, to the said Robert W. Higgins, Sr.

That the Acts of Congress hereinbefore referred to are one taking effect February 18, 1888, Chap. 13, 25 U. S. Statutes at Large, p. 35, and one taking effect February 13, 1889, Chap. 152, 25 U. S. Statutes at Large, p. 668.

[fol. 265] (c) Defendant has no knowledge as to whether or not the said Robert W. Higgins, Sr., is deceased and that said plaintiffs are his heirs immediate or remote, and defendant, therefore, specifically denies that the said Robert W. Higgins, Sr., is deceased and that the said plaintiffs are his heirs immediate and remote, as alleged in plaintiffs' petitions.

4. Defendant has no knowledge as to whether or not the said Robert W. Higgins, Sr., by the name and style of Robert W. Higgins and Susan A. Higgins, his wife, made, executed and delivered to the Choctaw Coal and Railway Company the alleged right of way deed and release of damages described in paragraph four of plaintiff's petition, a copy of which is set forth as Exhibit "B" thereto, and defendant therefore specifically denies that such a deed was executed and delivered, and defendant further specifically denies that the said Robert W. Higgins, Sr., at the time of the execution and delivery of said alleged deed was the owner of the fee simple title to the land described and set forth in said alleged right of way deed and release of damages. But defendant avers that if such a deed was executed and delivered, which is not admitted but is hereby expressly denied, neither the plaintiff nor his wife, Susan A. Higgins, by reason of the facts aforesaid, had any right, title, interest or estate, to, or in said land at the time of the execution and delivery of said alleged

quit claim deed and release of damages and that plaintiff now has no right, title or interest in or to said land or [fol. 266] any valid claim thereto.

5. (a) Defendant admits that the land described in plaintiffs' petition and claim by them was occupied and used continuously for right of way and railroad purposes only and for no other purpose, until the 4th day of December 1930, but defendant specifically denies that the date of possession and ownership of said land for railroad purposes began with the date of the execution and delivery of the alleged right of way deed and release of damages and defendant alleges that long prior thereto, to wit: on or about the early Spring of 1889 and soon after the said Act of Congress passed and approved February 13th, 1889, went into effect, the Choctaw Coal and Railway Company took possession of said land under said Acts of Congress for right of way and railroad purposes, and that said land was continuously the property of and owned and held by the said Choctaw Coal and Railway Company and its successors at interest, to wit, the said Choctaw, Oklahoma and Gulf Railroad Company and the said Chicago, Rock Island & Pacific Railway Company, from the 13th day of February 1889 to the said 4th day of December, 1930; and defendant further alleges that at the time it is alleged that the said quit claim deed and release of damages was executed and delivered, the said Choctaw, Oklahoma and Gulf Railroad Company was the owner of the fee title to said land and that neither the said Robert W. Higgins, Sr., nor his said wife had any right, title or interest therein, whatsoever.

(b) Defendant admits that on or about the 17th

[fol. 267] day of November, 1927, the Choctaw, Oklahoma & Gulf Railroad Company and the Chicago, Rock Island and Pacific Railway Company entered into a contract with defendant whereby they agreed for a valuable consideration to convey to the defendant by quit claim deed all their right, title and interest in and to the real estate described in Plaintiff's petition and to discontinue the use and occupation of said land and vacate and abandon the same for railway and right of way purposes as alleged in plaintiff's petition.

(c) The defendant further admits that the said railroad companies made application to the Interstate Commerce Commission of the United States for a Certificate of Public Convenience and Necessity, granting them permission to abandon a portion of their line of railroad through said City of Oklahoma City; and defendant further admits that, acting upon said application, the Interstate Commerce Commission of the United States, did, on the 9th day of April, 1928, issue a certificate of Public Convenience and Necessity, granting permission of said railroad companies to vacate and abandon said right of way including the land described in plaintiffs' petition and that Exhibit "D" attached to said petition is a true and correct copy of said certificate.

(d) Defendant further admits that on the 4th day of December, 1928, the said Choctaw, Oklahoma & Gulf Railroad Company and the Chicago, Rock Island and Pacific [fol. 268] Railway Company executed and delivered to the defendant an instrument of conveyance of the property involved in this suit, termed a quit claim deed, by which the said railroad companies conveyed all their right, title and interest in and to the land involved in this suit, as alleged in plaintiffs' petition; and defendant further admits that on the 4th day of December, 1930, the Railroad Companies abandoned the use of said land for right of way and railroad purposes and ceased to use and occupy the same and that said railroad companies took up and removed all railroad tracks therefrom and delivered possession of said land to the defendant as alleged in plaintiffs' petition.

(e) Defendant further admits that upon the abandonment of said land by said railroad companies, as aforesaid, the defendant entered into possession of said land and has

ever since retained and still does retain the possession thereof, to the exclusion of the plaintiffs therefrom and defendant further admits that it is not now holding, occupying and using said land, nor does it intend to occupy, use and hold said land or any part thereof, for railroad right of way or for any railroad purpose whatever, but defendant avers that it now holds, uses and occupies the same and intends to hold, use and occupy the same as a public park of said City and for public use as such park, as alleged in plaintiffs' petition.

6. Defendant admits that when the railroad companies discontinued the use and occupation of said land as and for [fol. 269] a right of way and for railroad purposes, their title thereto was defeated and terminated, upon a decree being entered in the United States District Court in and for the Western District of the State of Oklahoma, finding, holding and declaring that such railroad companies had so abandoned said property, and defendant specifically denies that upon such abandonment the full fee simple title to said real estate reverted to the plaintiffs and that they became entitled immediately to re-enter and take possession of said land under the terms and provisions of said alleged deed, a copy of which is attached to plaintiffs' petition as Exhibit "C", and the defendant alleges that by reason of the facts hereinbefore stated, the said plaintiffs do not now have nor have they ever had any right, title or interest in and to said property, nor have they ever had any lawful claim to or right of possession of said land or any part thereof. That the fee simple title to said land and the right of possession thereof belongs to defendant.

7. (a) Defendant specifically denies that by the terms and provisions of said alleged deed, which is attached to plaintiffs' petition as Exhibit "B" and the said Acts of Congress, the land described in plaintiffs' petition, upon being abandoned by the railroad companies and its use discontinued for railroad purposes, the title thereto reverted to and became vested in the plaintiffs, free, clear and discharged from all right, title and interest of the said railroad companies and this defendant.

(b) Defendant further specifically denies that upon the [fol. 270] abandonment of said property and the discontinuance of the use thereof for railroad purposes, the plain-

tiffs became entitled to the immediate possession thereof and that the defendant now wrongfully withholds possession from plaintiffs. Defendant further specifically denies that the said alleged quit claim deed from the said railroad companies to the defendant is ineffective in law to convey any right, title or interest therein.

(c) Defendant further specifically denies that it did not and could not acquire title to said property by and through said quit claim deed from said railroad companies. Defendant further specifically denies that said quit claim deed constitutes a cloud on title of plaintiffs and that they are entitled to have said deed cancelled and to have the title to said property quieted in them. And defendant alleges that by and through the terms and provisions of said acts of Congress and by express provisions of an Act of Congress which went into effect March 8, 1922, Chap. 94, 42 U. S. Stats. at Large 414, and the facts hereinbefore alleged, the said property described in plaintiff's petition became the property of defendant upon a decree of the said United States District Court being entered, finding, holding, and declaring that said property had been abandoned for railroad purposes and the defendant now owns said property and has the right of possession thereof.

III

For further answer the defendant says:

[fol. 271] 1. That Congress of the United States passed an Act which was approved on the 18th day of February, 1888, Chap. 13, 25 U. S. Statutes at Large, p. 35, granting the Choctaw Coal and Railway Company, a corporation created under and by virtue of the laws of the State of Minnesota, a right of way through the Indian Territory, upon which to locate, construct, operate and maintain a railroad from a point on Red River (the southern boundary line of Indian Territory) at a bluff known as Rockey Cliff, in the Indian Territory and running thence by the most feasible and practicable route through the said Indian Territory, to a point on the East boundary line immediately contiguous to the west boundary line of Polk or Sevier Counties in the State of Arkansas; also a branch line of rail-

way to be constructed from the most suitable point on said main line for obtaining a feasible and practicable route in a westerly or northwesterly direction to the leased coal veins of said Choctaw Coal and Railway Company in Tobucksey County, Choctaw Nation; with a right to construct, use and maintain such tracks, turnouts, branches and sidings and extensions as said company might deem it in their interest to construct along and upon the right of way and depot grounds provided for in said Act.

2. That said corporation was authorized by said Act of Congress to take and use for all purposes of railway a right of way 100 feet in width through said Indian Territory for said main line and branch of the Choctaw Coal & Railway [fol. 272] Company and to take and use a strip of land 200 feet in width with a length of 3,000 feet, in addition to said right of way, for stations for every ten miles of said road, with the right to use such additional grounds where there were heavy cuts or fills as may be necessary for the construction and maintenance of the road bed and extending 100 feet in width on each side of said right of way.

That a copy of said Act of Congress is hereto attached, marked Exhibit "A" and made a part hereof.

3. That subsequently Congress of the United States, passed an Act which was approved February 13, 1889, Chap. 152, 25 U. S. Statutes at Large p. 668, amending the Act of February 18, 1888 aforesaid and granting an extension of right of way to the said Choctaw Coal and Railway Company under the same terms and conditions as that granted under said Act approved February 18, 1888, as aforesaid, from the said leased coal veins of said Choctaw Coal & Railway Company in Tobucksey County, Choctaw Nation, in a Westerly or Northwesterly direction by the most feasible and practicable route to an intersection with the line of the Atchison, Topeka & Santa Fe Railway Company at the most convenient point between Halifax Station and Ear Creek, otherwise known as the North Canadian River, with the right to construct, use and maintain such tracks, turnouts, branches and sidings and extensions as said company might deem it in their interest to construct along and upon the right of way and depot grounds pro- [fol. 273] vided for in said Acts.

That a copy of said Act of Congress approved February 13, 1889, is hereto attached, marked Exhibit "B" and made a part hereof.

4. That immediately after the taking effect of the said Act of Congress approved February 13, 1889, as aforesaid, the said Choctaw Coal and Railway Company, in compliance with the terms and provisions of said Acts of Congress selected and located the general route and line of its railway as in said Acts provided, and thereafter fully complied with all the terms and conditions thereof.

5. Defendant further alleges that the selection of said right of way by the said Choctaw Coal and Railway Company and the location and construction of said line of railroad upon said right of way and over and across the land described in plaintiffs' petition and sought to be recovered herein was fully approved in all things by the Secretary of the Interior of the United States and by Congress expressly and impliedly in various and divers Acts as will more fully hereinafter appear.

6. That on the 21st day of February, 1891, an Act of Congress was approved by which the time was extended for the construction and completion of said Railway for a period of two years from the 18th day of February, 1892. That Congress thereafter passed an Act, which was approved January 22, 1894, extending the time for the completion of said railroad to February 18, 1896.

[fol. 274] Copies of said Acts are hereto attached, marked Exhibit "C" and "D" and made a part hereof.

7. That in the year 1894, the said Choctaw Coal & Railway Company became insolvent and all of its property and franchises were on September 8, 1894, sold to Geo. H. Earl, Jr., Sidney F. Tyler, Frances I. Gowan, Geo. B. Kirkbride and Nicholas Thuron, by orders and judgments entered in the United States Court for Second Judicial Division of Indian Territory, sitting at McAlester, Indian Territory, and in the District Court of Oklahoma County, in an ancillary proceeding to the receivership proceeding in said court at McAlester, Indian Territory, and the District Court of Canadian County in an ancillary proceeding to that in the said United States Court at McAlester, Indian Territory. That said sale was not only made with the approval of the

said United States Court for said second Judicial Division of the Indian Territory and the other courts aforesaid, but with the approval of the Congress of the United States, said approval being given by Act approved August 24, 1894, wherein the above named purchasers of the property and franchises of the Choctaw Coal and Railway Company were granted specific authority to organize a corporation to take over said property and franchise of said Choctaw Coal and Railway Company; said Act of Congress being published as Chapter 330, 28 Statutes, at Large, p. 502, is hereto attached marked Exhibit "E", and made a part of this answer.

8. That after the sale of all the property and franchises of [fol. 275] said Choctaw Coal & Railway Company, as aforesaid, the said purchasers duly organized under the laws of the United States, the Choctaw, Oklahoma & Gulf Railroad Company, which succeeded to the absolute ownership of all the rights, property and franchises, including rights of way and station grounds belonging to the said Choctaw Coal and Railway Company, and that the Congress of the United States passed an Act which was approved April 24, 1896, recognizing the said Choctaw, Oklahoma & Gulf Railroad Company as the purchasers of and successors to all the said property franchises and rights of the said Choctaw Coal and Railway Company, and especially finding, ascertaining and declaring that the said Choctaw, Oklahoma & Gulf Railroad Company and its predecessor in interest, to wit, the Choctaw Coal & Railway Company had fully complied with all Congressional Acts and requirements as to the selection of right of way and station grounds, the location and construction of said railroad over the lands of the various Indian tribes and the lands belonging to the United States, including that described in plaintiffs' petition.

That said Act of Congress comprises Chapter 122, 29 U. S. Statutes at Large, p. 98. A copy of said Statute is hereto attached and marked Exhibit "F" and made a part of this Answer.

9. That at the time of the passage and approval of the said Acts of Congress approved February 18, 1888, and February 13, 1889, the land which is now embraced in Oklahoma City, including the land described in plaintiffs' peti- [fol. 276] tion, belonging to the Creek Nation of Indians

and the United States. That said Creek Indians obtained said land by Treaty with the United States, bearing date February 14, 1833. That in the year 1866, said Creek Nation of Indians, by Treaty dated June 14, 1866, conveyed said lands to the United States for the purpose of locating other civilized tribes of Indians thereon.

10. That by Treaty dated January 19, 1889, the Creek Tribe of Indians completely relinquished all claims to this western land, including all the land in what is now Oklahoma City, North of the North Canadian River.

11. That by reason of these treaties and relinquishments aforesaid, the title of the United States to this Creek Indian land became absolute on the 19th day of January, 1889, save and except the title to the right of way and station grounds previously expressly granted to the Choctaw Coal & Railway Company as aforesaid, and certain other tracts of land and reservations, not involved in this suit.

12. That the land sought to be recovered by plaintiffs in this suit was never open to settlement as a part of the public lands of the United States. That the Congress in said Act, approved March 2, 1889, which provided for the opening of the Country, including that in and around Oklahoma City specifically reserved all rights of way previously granted by it to railroad companies. That thereafter, to wit: on the 23rd day of March, 1889, Benjamin Harrison, President of the United States, in his Proclamation opening [fol. 277] the country in and around Oklahoma City for settlement at 12 o'clock noon, April 22, 1889, expressly set forth in said proclamation that the Country was opened under terms of and subject to all the conditions, limitations and restrictions contained in said Act of Congress approved March 2, 1889, and the laws of the United States applicable thereto. That Congress of the United States and the President, in the manner aforesaid, expressly withheld said land from claim and settlement of all persons.

13. Defendant further alleges that the Orzaniz Act which took effect May 2, 1890, expressly recognized the rights of way and land for station grounds previously granted to railroad corporations as the property of such railroad corporations and not subject to settlement or the claim of any person who might attempt to settle upon or lay

claim to said rights of way and station grounds or any part thereof.

14. Defendant further alleges that at the time the said Robert W. Higgins, Sr., originally attempted to settle upon and acquire rights in said land he had actual and constructive notice of said Acts of Congress which took effect February 18, 1888 and February 13, 1889, and that the land was located upon the route from the coal leases of said railway company in Tobucksey County, Choctaw Nation to a place on the A. T. & S. F. line of railroad between Halifax and North Canadian River, as designated by said Acts of Congress; that said Railway Company had accepted the terms of said Acts and that it was then complying with all the [fol. 278] terms and conditions thereof and owned the title to said land. And defendant further alleges that the said Robert W. Higgins, Sr., had actual and constructive notice of the Act of Congress opening the Country for settlement and the President's said Proclamation and knew that the land described in plaintiffs' petition was not open to settlement and the rightful claim of any person whatsoever save and except the said Railway Company, and that the attempt of the said Robert W. Higgins, Sr. to acquire title to said land or an interest therein was contrary to the laws of the United States and the terms of said Proclamation, and in violation of the rights of said railway company as defined and set forth in said Acts of Congress.

Defendant further alleges that if the terms of said patent to said Robert W. Higgins, Sr., are broad enough to include the land owned by said railway company and claimed by plaintiffs as aforesaid, the United States Land Office was wholly without authority by reason of the fact hereinbefore alleged, to include said land in said patent and did not intend to include the same therein; and that said Robert W. Higgins, Sr. took said patent with actual and constructive notice of said Acts of Congress and all the facts aforesaid including the ownership of said land by said railway company and knew at the time that he took said patent, which is not admitted but is hereby expressly denied, that it conveyed to him no right, title or interest in said land or any part thereof.

[fol. 279] The defendant, therefore, charges and alleges that by reason of the Acts of Congress, the President's Proclamation and the facts aforesaid, the said Robert W.

Higgins, Sr. never acquired any right, title or interest in said land or any part thereof, and that neither he, if he is now living, nor his heirs, executors, administrators, devisees or other successors in interest, if he is now deceased, have any right, title or interest in said land or any part thereof.

15. Defendant further alleges that after the time it is alleged by the plaintiffs that said right of way deed and release of damages was executed by the said Robert W. Higgins, Sr., and his wife, Susan A. Higgins, described and set forth in paragraph four of plaintiffs' petition, the said Robert W. Higgins, Sr., and his wife, Susan A. Higgins, sold, transferred and conveyed to other persons by various and divers deeds the entire said Southwest Quarter of Section 33, Township 12 North, Range 3 West, alleged in plaintiffs' petition to have been patented to said Robert W. Higgins, Sr. That said last described tract of land was the entire tract or subdivision of land through which that portion of said right of way now claimed by plaintiffs runs. That said deeds purport to convey the said entire tract of land and did convey same insofar as said Robert W. Higgins, Sr., was interested, and said deeds contained no exception and made no reservation of any right, title or interest whatever in said land or in said right of way in favor of the said Robert W. Higgins, Sr. That [fol. 280] by virtue of said deeds the said Robert W. Higgins, Sr. parted with all his right, title and interest in said land, including said right of way, if any he ever had therein, which is not admitted, but is hereby expressly denied, and then and there ceased to be the owner of any real property or interest therein abutting upon that portion of said right of way now claimed by plaintiffs herein; and that he never thereafter acquired any interest or title in or to such abutting property or said right of way, and had no interest or title in or to such abutting property or in said right of way at the time of his alleged death.

That by reason of the facts aforesaid, the plaintiffs upon the alleged death of said Robert W. Higgins, Sr., succeeded to and took no right, title or interest in the property described in plaintiffs' petition and now have no right, title or interest therein, or right of possession of said property or any part thereof.

16. Defendant further avers that Congress passed an Act which was approved March 3, 1905, whereby it authorized the Choctaw, Oklahoma & Gulf Railroad Company to lease or sell its line of railroad running over the land involved in this suit to the Chicago, Rock Island & Pacific Railway Company. That said Act of Congress is published in 33 United States Statutes at Large, p. 991, to which reference is hereby made and same is hereby adopted as a part of this Answer. That pursuant to said Act of Congress the said Choctaw, Oklahoma & Gulf Railroad [fol. 281] Company leased all the property and franchises of the said Choctaw, Oklahoma & Gulf Railroad Company, comprising the right of way and Station grounds including the property described in Plaintiffs' petition, to the said Chicago, Rock Island & Pacific Railway Company, for nine hundred and ninety-nine years.

17. Defendant further avers that the said Choctaw, Oklahoma & Gulf Railroad Company and the Chicago, Rock Island & Pacific Railway Company made application to the Interstate Commerce Commission of the United States for a Certificate of Public Convenience and Necessity, granting them permission to abandon a portion of their line or railroad through Oklahoma City, Oklahoma, including that part of the line which runs over the property described in plaintiffs' petition and that on the 9th day of April, 1928, the said Interstate Commerce Commission granted the Certificate of Public Convenience and Necessity as applied for, which is in letters, figures and terms as plaintiffs' Exhibit "D", attached to their petition.

18. Defendant further alleges that on the 4th day of December, 1928, the said Railroad Companies, for a valuable consideration, executed and delivered to defendant an instrument of conveyance termed a Quit Claim Deed, whereby said Railroad Companies conveyed all their right, title and interest in and to all said abandoned right of way and station grounds, including the real estate described in plaintiffs' petition as alleged in their petition.

19. That thereafter, on the 4th day of December, 1930, [fol. 282] the said railroad companies wholly abandoned their right of way and station grounds over and upon the land described in plaintiffs' petition and delivered possession thereof to the defendant and thereafter, on the said

4th day of December, 1930, the United States District Court, in and for the Western District of Oklahoma, in case—The City of Oklahoma City, Oklahoma, a Municipal Corporation, Complainant, vs. The Chicago, Rock Island & Pacific Railway Company and the Choctaw, Oklahoma & Gulf Railroad Company, a corporation, defendants, the said case bearing Docket No. 1174—in Equity, entered a decree holding and declaring that the said railroad companies on the 4th day of December, 1930, wholly abandoned the said right of way and station grounds including the property described in plaintiffs' petition and that under and by virtue of the Act of Congress approved March 8, 1922, 42 U. S. Statutes at Large, p. 414, U. S. C. A. Chap. 43, Section 912, all the right, title, claim and interest in and to said property became absolutely vested in fee simple in the defendant.

A copy of the said decree is hereto attached, marked Exhibit "G", and made a part hereof.

20. Defendant further charges and alleges that by reason of the Acts of Congress, facts and circumstances aforesaid that the plaintiffs have never at any time had any right, title or interest or valid claim in or to the land described in their petition or any part thereof. That the defendant, being a municipal corporation, through which [fol. 283] said abandoned right of way runs and is located, became the owner thereof upon abandonment and the judicial determination thereof, as aforesaid, and is now the owner of the fee title to said land and is entitled to remain and continue in the possession thereof.

Cross-petition

For cross-petition against the plaintiffs the defendant hereby adopts by reference, all the facts and allegations made and set forth in Counts II and III of its Answer herein and makes the same as much a part of this Cross Petition as if fully set out herein by rewriting, and alleges further:

That said alleged patent of plaintiffs and their claim to the land is wholly unfounded and without right, but notwithstanding this fact, said alleged patent and claim constitute a cloud upon defendant's title to said land and

renders the title thereto objectionable and if permitted to remain upon and against said land the defendant will suffer irreparable injury, damage and loss, by reason thereof.

Wherefore, premises considered, defendant prays that the plaintiffs take nothing by their action; that plaintiffs' alleged patent be cancelled and held for naught, in so far as it relates to the property described in plaintiffs' petition and that the fee simple title to said land be decreed in defendant and fully quieted in defendant as against plaintiffs and all persons whomsoever; and that all persons [fol. 284] claiming by, through or under plaintiffs or any of them be forever barred and enjoined from asserting claim to any title or interest to or in said land or any part thereof, and that defendant recover all costs and be granted such other further and different relief as to the Court may seem equitable and proper in the premises.

A. L. Hull, Municipal Counsellor; W. H. Brown, Special Assistant, Attorneys for Defendant.

The Acts of Congress pleaded by the defendant in the foregoing Answer and Cross-petition and copies of which are attached thereto as Exhibits A to F, inclusive are the same as Exhibits A to F, inclusive, to the Answer and Cross-petition in the Noble Case and Exhibits A, B, C, D and F appear herein at pages 47, 57, 59, 60, and 62 supra, and a statement of the contents of Exhibit E appears at page 37 supra, and the copy of the Court Decree attached as Exhibit G to the foregoing Answer and Cross-petition is the same as Exhibit G to the Answer and Cross-petition in the Noble Case and appears herein at page 65 supra.

[fol. 285] [File endorsement omitted.]

[fol. 286] IN THE DISTRICT COURT OF OKLAHOMA COUNTY

[Title omitted]

REPLY AND ANSWER TO CROSS-PETITION—Filed March 30, 1931

Come now the plaintiffs above named and for their reply to the answer, and answer to the cross-petition of the defendant filed herein, allege and say:

1. That they deny every material allegation in said answer and cross-petition contained, except such as admit or do not contradict, or are not in conflict with the allegations of their petition, and except such as are hereinafter specifically admitted.

[fol. 287] 2. That they admit the enactment of the several and various Acts of Congress and the promulgation of the proclamation by the President of the United States as pleaded and set forth in the defendant's answer and cross-petition, but deny the conclusions and argument drawn therefrom and the construction and interpretation placed thereon by the defendant in its said answer and crosspetition, and deny that said Acts of Congress and the said proclamation have the meaning or contain the terms and provisions in precise language or in substance or effect as alleged by the defendant in its said answer and crosspetition.

3. That they deny that the Act of Congress approved March 8, 1922, 42 Statutes 414, Title 43, Section 912, U. S. Code, has any application to the subject matter of this action or to the title of the plaintiffs to the real estate involved herein, for that the title to said real estate became vested in Robert W. Higgins, Sr., through whom the plaintiffs derive their title, by title derived from the United States more than twenty-five years prior to the enactment of said Act of Congress, and they aver that if it should be deemed and held that said Act of Congress did apply to the subject matter of this action, and to the plaintiffs' title to the real estate involved herein, then said Act of Congress is unconstitutional and void, for that it is in contravention of the Fifth Amendment to the Constitution of the United States in that it would have the effect to deprive the plaintiffs of their property without [fol. 288] due process of law and to impair the obligation of a contract.

4. That they aver that under the provisions of the Act of Congress of March 3, 1891, 26 Statutes 1099, Title 43, Section 1126, U. S. Code, the United States may not bring suit to vacate or annul any patent to real estate thereafter issued by it unless such suit is brought within six years after the date of such patent, and that, therefore, the United States could not by suit, and the Congress could not by the enactment of a statute such as said Act of March 8, 1922, more than twenty-five years after the issuance of the patent to the real

estate here involved, Exhibit A to the plaintiffs' petition, cancel or annul such patent and re-vest the title to the real estate therein described, or any part thereof, in the United States.

5. That by reason of its said patent, Exhibit A to the plaintiffs' petition, the United States was and is estopped to assert that the real estate described therein was not public lands and was not a part of the public domain, and was and is estopped to assert that it had and retained any right, title, interest or estate in or to any part thereof, subject to the use of the same for a railroad right of way, which the Congress might dispose of upon the cessation of the use and occupancy thereof for such purpose, and the defendant is likewise estopped to assert any right, title, interest or estate in or to the particular real estate involved in this action as derived by it from the United States under the provisions of said Act of Congress, of March 8, 1922.

[fol. 289] 6. That they aver that the defendant derives all and whatever claim of right, title, interest or estate it may have to the real estate involved in this action by quit claim deed from the Choctaw, Oklahoma and Gulf Railroad Company and the Chicago, Rock Island and Pacific Railway Company, and that said grantors in said deed derived all of their title thereto as successors to, and by, through and from, the Choctaw Coal and Railroad Company, and that it and they were and are estopped, and the defendant as their successor in title is estopped, to deny the title of the said Robert W. Higgins, Sr., to said real estate on and prior to the 24th day of March, 1898, by reason of the fact that the said Choctaw Coal and Railway Company did on said 24th day of March, 1898, purchase, receive and accept from the said Robert W. Higgins, Sr., the said right of way deed, Exhibit C to the plaintiffs' petition, which contained the express limitation and condition on the grant of the real estate therein described that if and when the same was abandoned and ceased to be used for railroad purposes, it should revert to the grantor, his heirs or assigns, and thereby said railway company contracted and agreed with the said Robert W. Higgins, Sr., that said real estate would revert to him or his heirs when its use for railroad purposes was abandoned and ceased, and the plaintiffs as heirs to the title of the said Robert W. Higgins, Sr., to said real estate have all the rights,

under said right of way deed which said Robert W. Higgins, Sr., would have if living.

[fol. 290] 7. That they aver that the said Choctaw Coal and Railway Company did not take, nor claim, intend or pretend to take, title to its right of way across the real estate involved in this action under and by authority of the provisions of said Act of Congress of February 18, 1888, as amended by said Act of Congress of February 13, 1889, and did not at any time file in the office of the Secretary of the Interior a map showing the route of its located line of road over said real estate, and further that if it did in fact file such a location map showing its line passing over said real estate, which the plaintiffs do not admit, then the same was not filed until after the right of the said Robert W. Higgins, Sr., to acquire from the United States the title to the said real estate had attached thereto nor until after it had filed such location map showing its line passing by and around, and not over and across, the said real estate, which filing of such map exhausted its right to make location of its said line of road under the provisions of said Acts of Congress and it could not thereafter, and after the rights of the said Robert W. Higgins, Sr., had intervened and attached, relocate its said line under the provisions of said Acts of Congress over and across said real estate, and further that it abandoned, relinquished and waived all claim of right to locate and take its right of way across said real estate under the provisions of said Acts of Congress, for that on or about December 4th, 1891, it changed the route of its line from that shown on its said location map [fol. 291] to another entirely different one which included the real estate involved herein, and without filing another location map in the office of the Secretary of the Interior showing such change, it purchased the right of way on such changed location from one John W. Dawson and wife on said date and took a deed therefor which expressly provided that said railway company took title to said right of way for railroad purposes only and that its said title would cease and revert to the grantor or owner of said real estate whenever the use thereof for right of way and railroad purposes ceased and was abandoned, and that it accepted said deed and changed the located route of its line so as to cross the real estate therein described, which included the real estate involved in this action.

8. That they specifically deny that the said Choctaw Coal and Railway Company complied with the provisions of said Act of Congress of February 18, 1888, as amended by said Act of Congress of February 13, 1889, and aver that all and whatever right it ever had to take and use a right of way for its said road over and across the said real estate involved in this action became and was forfeited for noncompliance with the provisions of said Acts of Congress and had ceased to exist prior to the commencement of said condemnation proceedings above referred to and the purchase of the title conveyed by said deed, Exhibit C to plaintiffs' petition.

9. That they admit that upon the abandonment of said real estate by said Choctaw, Oklahoma and Gulf Railroad [fol. 292] Company and said Chicago, Rock Island and Pacific Railway Company for a right of way and on December 4, 1930, the District Court of the United States for the Western District of Oklahoma made and entered its judgment and decree in said cause No. 1174—Equity in said Court, adjudging and decreeing that the said railroad companies had abandoned and forfeited all their right, title and interest in and to the real estate therein described and including the real estate involved in this action, and that a copy of said judgment and decree is attached as Exhibit G to the defendant's answer and cross-petition herein.

10. That they aver that if the defendant, in appropriating and using the real estate involved in this action as and for a public park, as alleged in paragraph 4 of plaintiffs' petition and admitted in paragraph 4 (g) of its answer, without having purchased or attempted to purchase, and without having instituted condemnation proceedings against the plaintiffs' right and title thereto, or having compensated the plaintiffs in any way therefor, and without intending to do so, relies upon and justifies its action under the proviso found in Section 5505 of Compiled Oklahoma Statutes, 1921, which reads as follows, to wit:

"Provided, that in case any corporation or municipality authorized to exercise the right of eminent domain shall have taken and occupied, for purposes for which it might have resorted to condemnation proceedings, as provided in [fol. 293] this article, any land, without having purchased or condemned the same, the damage thereby inflicted upon

the owner of such land shall be determined in the manner provided in this article for condemnation proceedings;"

then that said statute, in so far as it provides or may be construed to provide that the defendant may occupy and remain in possession of said real estate before the compensation and damages to the plaintiff therefor have been ascertained and paid, is unconstitutional and void for that it contravenes Section 24 of Article 2 of the Constitution of the State of Oklahoma.

Wherefore, having fully replied to the answer and answered the cross petition of the defendant herein, the plaintiffs pray for judgment in their favor, as in their petition they have prayed.

Fred Ptak and Chas. H. Garnett, Attorneys for Plaintiffs.

[File endorsement omitted.]

[fol. 294] IN THE DISTRICT COURT OF OKLAHOMA COUNTY, STATE OF OKLAHOMA

No. 66,314

ROBERT W. HIGGINS et al., Plaintiffs,

vs.

THE CITY OF OKLAHOMA CITY, a Municipal Corporation, Defendants

CAPTION

Be it remembered: That on this 16th day of September, 1931, the same being a regular judicial day of the regular September Term, 1931, the above and foregoing cause coming regularly on for trial on its merits, pursuant to assignment duly made, had and published and all parties being present by their respective counsel as above stated, and all parties having announced ready for trial and having agreed that said cause be tried by the Court, without the intervention of a jury, thereupon, the opening statement for and on behalf of the plaintiffs was made to the Court by Mr. Gar-

nett and thereafter, the opening statement for and on behalf of the defendant was made to the Court by Mr. Hull; and thereafter, the following proceedings were had in regular order, to wit:

[fol. 295] STATEMENT OF THE EVIDENCE

This case was called for trial in the same court in which the case of George Noble et al vs. City of Oklahoma City, No. 66,726 was tried and on the day following the conclusion of the trial of that case. It was stipulated that all evidence, both oral and documentary, insofar as desired by either party, that was offered in the Noble case, should be deemed offered in this case, with the same objections, if any, and the same rulings of the court and the same exceptions (C-M. 105).

Plaintiffs introduced a certified transcript from the General Land Office of the proceedings in relation to the entry of the southwest quarter of Section 33, Township 12 North, Range 3 West (C-M. 105-149).

These proceedings show the filings on this tract and a long drawn out land office contest. There were eight claimants, and the local land office awarded it to John M. Dawson. The other claimants appealed to the Commissioner of the General Land Office at Washington, who affirmed the judgment of the register and receiver. Six of the other claimants appealed to the Secretary of the Interior. In a decision dated June 29, 1894, the secretary reviewed the history of the contest and the evidence and awarded the tract to Robert W. Higgins. This decision is reported as Higgins vs. Adams, Vol. 18, page 598, of Decisions of the Department of the Interior Relating to Public Lands. The fact is shown that [fol. 296] Higgins arrived and made settlement on the tract at 10 minutes after 2 o'clock in the afternoon of April 22, 1889 (C-M. 143-148), and made application to enter it as a homestead on May 2, 1889 (C-M. 108).

Plaintiffs introduced a patent, based on a homestead certificate, from the United States to Robert W. Higgins, conveying said quarter section, dated September 19, 1896, and recorded October 2, 1896, in Book 12 at page 471 of land title records of Oklahoma County, Oklahoma (C-M, 149-152). It appears in full at page 256, supra.

Plaintiffs introduced a certified copy of a right of way deed from Robert W. Higgins and wife to the Choctaw Coal

and Railway Company, dated March 24, 1898, and recorded March 26, 1898, in Book 13 at page 181 of the land title records of Oklahoma County. This conveyance is entitled right of way deed and release of damages and recites a consideration of $400.00 and is the same deed of which a copy is attached as Exhibit B to the plaintiffs' petition in the deraignment of their title, and appears in full at page 258, supra (C-M. 157-162).

Plaintiffs introduced the contract between the city of Oklahoma City and the St. Louis-San Francisco Railway Company, dated November 17, 1927 (C-M. 162-169). This is the same instrument put in evidence in the Noble case as Exhibit 19, by the terms of which the railroad agreed to [fol. 297] sell, and the city agreed to purchase, at a price stated, their rights of way through the city.

The plaintiffs introduced the same certificate of public convenience and necessity issued by the Interstate Commerce Commission, authorizing the abandonment by the Choctaw, Oklahoma & Gulf Railroad Company and the Chicago, Rock Island & Pacific Railway Company of the portion of their line of road through Oklahoma City, described in the application that was introduced in the Noble case (C-M. 170-172). It was stipulated that the land so described included the land involved in this case. This certificate appears in full at page 23, supra.

Plaintiffs introduced a deed from the Choctaw, Oklahoma & Gulf Railroad Company and the Chicago, Rock Island & Pacific Railway Company to the City of Oklahoma City, dated December 4, 1928, recorded in Book 356 at page 377 of the land title records of Oklahoma County (C-M. 173-184.) It was stipulated that this deed was executed by the companies under the contract of November 17, 1927, and that it conveyed the land involved in this action and other lands.

Plaintiffs introduced the decree of the United States District Court for the Western District of Oklahoma, in equity case No. 1174, being the same decree introduced in the Noble case. Its purport was to adjudge the abandonment [fol. 298] by the railroad companies of their right of way over the land described, which included the land involved in this action, and to adjudge the city of Oklahoma City to be the owner of their title (C-M. 185, 75-83). It appears in full at page 65, supra.

Plaintiffs introduced the oral testimony of Susan A. Higgins. She lives in Oklahoma City, was 83 years old, and came to Oklahoma City May 22, 1889, as the wife of Dr. Robert W. Higgins. He came on April 22. They had a family of six children who came with her by train from Arkansas City, Kansas. On arrival she and the children went to what is now No. 729 West Main Street, where Dr. Higgins had built a three room house for them. The family, consisting of Dr. Higgins, herself and the children, lived there continuously until after 1898, when they obtained patent to the land, and in fact she had moved away from that location only four years prior to the time of trial. She recalled when the Choctaw road was built across the quarter section, which was probably in 1892. They had lived there at least three years when that road was built. There were several contests over the right to homestead entry of the land, and these delayed the issuance of the patent (C-M. 186-189).

Plaintiffs introduced the oral testimony of Estella Higgins Jones. She was the daughter of Dr. Robert W. Hig- [fol. 299] gins and Susan A. Higgins. Her father died June 8, 1916. He left nine children surviving him. They were John, Cass, Robert, Raleigh, Burford and William Higgins, and Mrs. Gertrude Koelsch, Mrs. Nellie Shannon and herself. William Higgins, a son of Dr. Higgins by a former marriage and a half brother to the witness, died about 1923 or 1924, leaving two children surviving him, Mrs. Fairy Adkins and Mrs. Eva McMillan. He was not married at the time of his death, and these two children were his only heirs. His estate was never probated. Dr. Higgins and Mrs. Higgins, the witness' father and mother, were divorced about 1907. At the time of her father's death his only heirs were the children she had named. Then later William died, leaving his two children as his only family and only heirs. The persons named, all of whom are plaintiffs in the case, were now the only heirs, direct or remote, of Dr. Higgins. Cass Higgins had been adjudged insane on August 30, 1913, and had been an inmate of an asylum at Patton, California, ever since. She remembered the construction of the Choctaw road across the Higgins family homestead. The family arrived on May 22, 1889, and the road was built some three or four years later (C-M. 190-193).

Thereupon it was stipulated and agreed that in the divorce proceedings between Susan A. Higgins and Robert [fol. 300] W. Higgins, there was a property settlement and a decree of court by which she was awarded certain described city lots and all the rest of their property was awarded to or left in Dr. Higgins, and that the lots awarded by that decree to Mrs. Higgins were not included in the real estate involved in this action.

It was also stipulated and agreed that between the date of December 4, 1930, when the defendant took possession of the land involved in this action, and January 6, 1931, when the action was commenced, no improvements were placed on the land involved by the city, and the surface had not been graded, but that since that date the city had enclosed part of the land with a one-wire fence and had caused part of it to be graded and planted in bermuda grass (C-M. 194).

The plaintiffs rested their case.

Defendant introduced all of the evidence, both documentary and oral, which it had introduced in the Noble case, and the same stipulations were entered into (C. M. 196-383).

In addition defendant introduced further oral testimony of L. D. Cornelius as follows (C. M. 286-297):

[fol. 301] Mr. L. D. Cornelius, being called as a witness on behalf of the defendant in this case, being first duly sworn upon his oath, testifies as follows:

Direct examination.

By Mr. Hull:

Q. Mr. Cornelius, it has been stipulated in this case that all of the testimony you gave yesterday might be considered as your testimony in this case, without having to go through it a second time. Now, on that testimony, I want to ask you why it was necessary, if it was necessary, in the quarter section of land which is involved in this case, which is the quarter section immediately west of Walker Street, pitching the original townsite to adopt the line of construction of the road south of where that line showed on the map, filed July 13, 1889, (handing witness a map or diagram identified as Exhibit 12)?

A. It was done as a compromise matter to get a place to build a railroad, that's the best explanation I would give for it.

Q. Well, let me ask you again; perhaps I haven't made myself clear. You testified yesterday that that curve was made but your testimony in this case was that the road across the southeast quarter was constructed, as it was constructed, due to the circumstances and conditions and controversy with the citizens as you testified to yesterday.

A. Yes, sir, that was the reason.

[fol. 302] Q. Yes, sir; now, after you had made that construction through the southeast quarter, why did the road continue south of your original alignment through the adjoining quarter?

A. I don't know exactly, but there was undoubtedly some reason for—there is where our angle occurred, right about there (indicating on diagram).

Q. Was it, Mr. Cornelius, this is probably the reason, was it necessary that that be turned in order to avoid making such an abrupt curve after you had constructed south through the townsite in order to get back to your original alignment?

A. No, I don't think it was.

Q. You don't think it was?

A. I think that we started at that point; that ground—it would be some distance north of the center of the southwest quarter of Section 33. We run a little parallel, extended this alley line out through there to where the eighty, or about where the eighty acre line would be, dividing that quarter into two eighty's, east and west; and there is where we made an angle, a small angle to the north, to go into our right of way up there. (Indicating.)

Q. Let me ask you this, after you had constructed your line due east and west to the southeast quarter, could you have gotten back on to your alignment up here without making such an abrupt curve?

A. No, it would have been—this location with that small [fol. 303] angle would have—well, I don't think from a construction standpoint, or any other standpoint, it would have been really any different but my recollection is that that small angle would place it on that eighty acre line, that would be the far quarter line—now, what those were I can't recall about.

Q. You don't recall about that?

A. No, whether it was at the request of the, of some people who were interested in getting this route, or whether

it was the intent of the quarter, I couldn't say, but there was a reason for putting that little angle and that slight curve on that quarter line.

Q. You don't think as a matter of engineering construction that when the line was changed through the townsite that change caused the change in the adjoining quarter section?

A. Yes, we had to make some change here (indicating). We dropped down here (indicating). We dropped to the southeast, extended tangent to the last track to the south and it could come back again on to our original location and we had to make that change in the quarter.

Q. It was because you had dropped this line in the southeast quarter south of your original alignment but when you reached the southwest quarter in order to avoid a direct turn-back, to your original alignment, you had to continue your line a little south through that quarter?

A. Yes, sir.

[fol. 304] Q. Yes, sir.

A. To make a lighter curve.

Q. Yes, sir.

A. And a better alignment.

Cross-examination.

By Mr. Garnett:

Q. Mr. Cornelius, you were not with the railroad company in the construction, at the time of the construction of the road across the southwest of 33, were you?

A. No, sir, that was done later.

Q. Yes; you testified yesterday but I have forgotten the date as to when your connection with this work here was severed. When was that?

A. In December 31, 1890.

Q. 1890?

A. Yes, sir.

Q. Well, now, had the change of location of the road through the city, through the southeast of 33, been made at the time or prior to your severance of connection with the railroad company?

A. That may cover some ground; the surveys had been made and the surveys going through on this change, that had been made and retraced.

Q. Retraced on what, the profile map or location map?

A. No.

[fol. 305] Q. On what?

A. On the ground.

Q. Oh, on the ground.

A. It was made on the ground but there wasn't anything done with it up to the time of January 1, 1891.

Q. You don't mean the line was retraced on the ground, do you?

A. Yes, sir.

Q. Well, when was it first traced?

A. The change was made the first week in April.

Q. Of what year?

A. 1890 and, the line was restaked because the citizens, I think it was the—I call it the Citizens Committee, the stakes had been obliterated and I set those stakes exactly forty-one years ago today on the 16th of September.

Q. Well, now, those stakes that you re-set, are the stakes along the course of the right of way of the railroad as was afterwards actually built, were they?

A. Well, the only way I can answer that is by going over the ground since I have been in Oklahoma City the last few days.

Q. Well, all right; that's all right.

A. And I think that they have followed that survey, I am quite sure; they may have varied in some slight particular but I think if the original notes of that survey that [fol. 306] I made on this change, could be found, the alignment notes, you would find that they were exactly on the line that was built on and part of it is not.

Q. Well, then, the change from the original location of the road, as made on the location map of July 13, 1889, down to where the road was afterwards built across the southwest of 33, was made to conform to the changed line through the city, was it?

A. Yes, sir.

Q. Now, do you know how far it was before you got back on to your original located line, how far west the line went?

A. We tied into a curve farther west.

Q. Do you know how far?

A. Probably a mile, between a mile and a mile and a half, something like that; that's probably it.

Q. Refreshing your recollection from this map, which we had a moment ago, on which the white line of the—which the white line appears, the line of actual construction, about where did that join the original survey?

A. Can I make some marks on here?

Q. Well, it's not necessary. In what section?

A. Well, in this section (indicating).

Q. Well, what is it?

A. Section 31.

Q. Yes, and at what point in 31?

[fol. 307] A. On the intersection of those two tangents would be almost on the quarter section line on the north half of 31.

Q. Yes, sir. The, it would be on the middle line north and south on Section 31 at a point between one-fourth and one-third of the distance south of the north line of the section?

A. Where we graded the whole location?

Q. The whole location.

A. No, sir.

Q. That isn't? All right, where is it?

A. There is the end of the curve (indicating).

Q. Now, you had an angle going east and west; now, where is the point on this map where those two lines come together?

A. It isn't shown, sir.

Q. Do you know and can you tell from the map?

A. I can give it to you approximately.

Q. All right, where is it?

A. Somewheres right about there (indicating).

Q. Now, where is "there"?

A. Well, it's some place on the east side, on the northwest quarter of section 31. To get back to the original survey, we had to put in a curve to the north.

Q. Yes, I understand that but at what point on the ground, describing it by section number and the approximate location, did you get back on the original survey?

[fol. 308] A. We got back to our original location right at the beginning of this curve (indicating).

Q. Now, where is the beginning of that curve on this map?

A. It's in the northwest quarter of Section 31.

Q. Can you tell how far south of the original survey the original location map, this line on which the road was con-

structed, is, where you cross the east line of the southwest quarter of section 33?

A. I know about where this intersection was in the original location.

Q. That's what I want to know, how far from here to here (indicating).

A. My recollection is, it is about 600 feet and I vary that from being on the ground later.

Q. Do you know, Mr. Cornelius, when the railroad was constructed across the southwest quarter of 33?

A. Only by hearsay; I have no definite dates.

Q. You were not here at that time?

A. No, I was not here; I was in Denison, Texas, but I couldn't give you anything that you couldn't get——(interrupted).

Q. I am just asking you; it was after December 31, 1890, when you quit the service of the road?

A. December 31, 1890, when I left the service and it was graded through there after that.

[fol. 309] Mr. Garnett: That's all.

Redirect examination.

By Mr. Hull:

Q. Mr. Cornelius, when you made that location through Oklahoma City, through the townsite, on the direct east and west line, at that same time that you said yesterday was between the 10th and the 16th or 17th or September, 1890, you also made the location through the southwest quarter?

A. Yes.

Mr. Hull: Yes, sir; that's all.

Mr. Garnett: That's all.

(Witness excused.)

The defendant rested its case.

In rebuttal plaintiffs introduced the same evidence, both oral and documentary, that was introduced in the Noble case on the day preceding, except the court files in the condemnation proceedings, case No. 212 in the District of Oklahoma County, Territory of Oklahoma (C-M. 401-455).

[fol. 310] It was stipulated that the defendant in taking possession of the property involved in this action on December 4, 1930, did not take it with the consent of the plaintiffs, except such consent as might be implied as a matter of law, but went in under a delivery of possession from the railroad company (C-M. 456).

It was stipulated that all of the property involved in this action was on January 1, 1922, and had been continuously since, within the corporate limits of Oklahoma City, but that it was outside of the limits of the original townsite of Oklahoma City, which covered only the southeast quarter of said Section 33 (C-M. 457).

Both parties rested and the evidence was closed.

[fol. 311] Thereupon the case was argued orally to the Court and written briefs were submitted and the Court took the matter of his decision and judgment therein under advisement (C-M. 465).

And thereafter on the 9th day of January, 1932, the case again came on for decision and judgment of the Court and thereupon the Court announced and rendered a decision and judgment for the defendant (C-M. 466).

[fol. 312] In the District Court of Oklahoma County

[Title omitted]

Motion for New Trial—Filed Jan. 11, 1932

Come now the plaintiffs in the above entitled action and move and ask the court to vacate and set aside the former decision of the court made and rendered in this action on the 9th day of January, 1932, and to grant these plaintiffs a new trial of this action for the following causes which affect materially their substantial rights:

[fol. 313] 1. For irregularity in the proceedings of the court and of the defendant and for abuse of discretion on the part of the court by which the plaintiffs were prevented from having a fair trial.

2. For misconduct of the defendant.

3. For accident and surprise which ordinary prudence on the part of the plaintiffs could not have guarded against.

4. For that the said decision of the court is not sustained by sufficient evidence.

5. For that the said decision of the court is contrary to law.

6. For newly discovered evidence material to these plaintiffs which they could not with reasonable diligence have discovered and produced at the trial.

7. For error of law occurring at the trial and excepted to by these plaintiffs at the time.

Libby & Sherwin, Suits & Disney, Fred Ptak, Chas. H. Garnett, Attorneys for Plaintiffs.

[File endorsement omitted.]

[fol. 314] And thereafter on the 21st day of January, 1932, the cause again comes on for hearing on the motion of the plaintiffs for a new trial, and the Court, having heard the argument of counsel thereon and considered the same, orders that said motion be overruled, to which the plaintiffs except and in open court give notice of appeal to the Supreme Court and ask and are given time in which to make and serve case-made for their appeal (C-M. 469).

And thereafter on the 23rd day of January, 1932, there was filed in the cause and recorded on the journal of the Court the decision and judgment of the Court and its order overruling plaintiffs' motion for new trial and allowing their appeal and a record of the proceedings for such appeal all in the words and figures as follows, to wit, (C-M. 470-477):

[fol. 315] In the District Court of Oklahoma County

[Title omitted]

Journal Entry of Judgment—Jan. 23, 1932

On this 15th day of September, 1931, being one of the regular court days of the September, 1931, term of this court, this cause comes on for trial in its regular order. The plaintiffs appear in person and by Suits and Disney,

[fol. 316] Libby and Sherwin, Fred Ptak and Chas. H. Garnett, their attorneys. The defendant appears by Albert L. McRill, its municipal Counselor, and A. L. Hull, its Assistant Municipal Counselor. Both plaintiffs and defendant announce ready for trial.

Thereupon, trial by jury is waived in open court and all parties consent and agree that the Court shall try the cause and make decision and render judgment therein without the intervention of a jury.

Thereupon, the trial is begun and all the evidence on the part of the plaintiffs and defendant, respectively, is introduced and the argument of counsel is heard, and at the conclusion thereof, the Court takes under advisement the matter of decision and judgment.

On the 9th day of January, 1932, being one of the regular court days of the January, 1932, term of this Court, this cause again comes on for decision and judgment by the Court. The parties appear as upon the trial.

Thereupon, the Court, having heard all the evidence and the argument of counsel, and being fully advised in the premises, announces and makes decision and judgment in the case.

The Court finds the issues for the defendant and finds that judgment should be that the plaintiffs take nothing by the action and that the defendant have judgment for its costs, and judgment on its cross-petition.

The Court holds, as a matter of law, that the Act of Congress of February 18, 1888 (25 Stats. 35) together with [fol. 317] the Acts amendatory thereof, was a present absolute grant of the land described in the petition herein for right of way and station grounds to the Choctaw Coal and Railway Company, vesting the fee title to said land in said Company immediately upon the enactment and approval of said Act, with a possibility of reverter in the United States, and that the patent purporting to convey to R. W. Higgins the whole of the Southwest Quarter of Section Thirty-three (33), in Township Twelve (12) North, Range Three (3) West of the Indian Meridian, was ineffective to convey to said R. W. Higgins any title to the land within the boundaries of the right of way of said Company across said quarter section as and when located, and that, therefore, the said right of way having been located in conformity to said Act, so as to include all the land involved

in this action, neither the plaintiffs, nor any persons through whom they claim to have derived title under said patent, now have, or have ever had, any sort of right or title whatsoever to said land.

The Court holds further, as a matter of law, that the land included within the boundary lines of said right of way, as the same should thereafter be and was thereafter located, was, by the Act of Congress aforesaid, appropriated to a lawful use and thereby severed from the public domain of the United States, and was never thereafter subject to preemption, homestead or townsite entry, and that the Land Department of the United States had no authority, after the enactment of said Act, to grant any title to said land to any person.

[fol. 318] The Court further holds, as a matter of law, that upon abandonment for railway purposes of said land within the boundaries of said right-of-way and station grounds, title to said land revested in the United States, and upon entry of the decree of the United States District Court for the Western District of Oklahoma finding such abandonment, that the title to said land immediately vested in the City of Oklahoma City, a municipal corporation, by virtue of the Act of Congress of March 8, 1922 (42 Stats. 414).

It is, therefore, considered, ordered and adjudged by the Court that the plaintiffs take nothing by this action, and that their petition here be, and it is hereby dismissed and that all costs of the action be, and they are hereby, taxed and adjudged against the plaintiffs.

It is further considered, ordered and adjudged by the Court that the City of Oklahoma City, a municipal corporation, is vested with the absolute fee simple title to the land involved in this action described as follows:

A strip of land One Hundred (100) feet wide, the northeast corner of which commences at a point on the west line and One Hundred (100) feet south of the northwest corner of Lot Twenty (20), in Block Sixty-four (64) in the original plat of the City of Oklahoma City, in the County and State of Oklahoma, as the same is on file and of record in the land title records of said County, and the Southeast [fol. 319] corner of which commences at a point on the west line and One Hundred (100) feet north of the southwest corner of Lot Nineteen (19) in said Block Sixty-four (64),

and which extends thence for a distance in a westerly direction and thence in a northwesterly direction across the Southwest Quarter (S. W. ¼) of Section Thirty-three (33), in Township Twelve (12) North, Range Three (3) West of the Indian Meridian in said County and State, to the west line of Shartel Street extended north, as said street is laid out in Main Street Addition to said City of Oklahoma City according to the recorded plat of said Addition, the same being the right of way as originally surveyed, laid out and taken by the Choctaw Coal and Railway Company about the year 1892, and thereafter taken, occupied and used by the Choctaw, Oklahoma and Gulf Railroad Company, as successor to said Choctaw Coal and Railway Company, and afterward occupied and used by the Chicago, Rock Island & Pacific Railway Company as lessee of said Choctaw, Oklahoma & Gulf Railroad Company, as and for a railroad right of way and for railroad purposes; the said strip of land being more particularly designated upon a blueprint plat or map thereof, marked [fol. 320] Exhibit "A", attached to the original petition filed in this cause;

subject only to the reservations contained in the Act of Congress of March 8, 1922, aforesaid (42 Stats. 414), and that such title be, and the same is hereby fully quieted in said City as against the plaintiffs herein, and all persons claiming by, through or under said plaintiffs; and that said plaintiffs and all persons claiming by, through or under said plaintiffs, or either of them, are forever barred and enjoined from asserting claim to any title or interest to or in said land, or any part thereof.

To all of which findings, decision and judgment of the Court the plaintiffs at the time excepted, and their exception is allowed.

Thereafter, and on the 11th day of January, 1932, the plaintiffs filed herein their motion for new trial in writing, and now on this 21st day of January, 1932, the said motion of the plaintiffs for new trial comes on for hearing in its regular order. The parties appear as upon the trial of the action.

Thereupon, the Court considers said motion, and having heard the argument of counsel thereon, and being fully advised in the premises, finds that the same should be overruled and denied.

It is therefore, considered, ordered and adjudged by the Court that the motion of the plaintiffs in this action for new trial be, and the same is hereby overruled and denied.

To all of which findings, decision and order of the Court [fol. 321] overruling their said motion for new trial the plaintiffs at the time except and their exception is allowed.

Thereupon, the plaintiffs give notice in open court of appeal to the Supreme Court of the State of Oklahoma from the said findings, decision, judgment and orders of the Court in this action, and requests the Court to order and direct the clerk to enter their said notice of appeal upon the journal and trial docket of the Court.

Thereupon, it is considered and ordered by the Court that the clerk of this Court be, and he is hereby ordered and directed to enter of record and to spread upon the trial docket and journal of this Court the said notice of appeal of the said plaintiffs in the manner provided by law.

Thereupon, the plaintiffs request an extension of time in which to make and serve case-made for appeal herein. And the Court finds that for good cause shown, the time fixed by statute for making and serving case-made for appeal herein should be extended to sixty days from this date.

It is, therefore, considered and ordered by the Court that the plaintiffs herein be, and they are hereby granted sixty days from this date in which to make and serve case-made for appeal herein, and that the defendant be, and it is hereby granted three days thereafter in which to suggest amendments thereto, and that the same may be settled and signed upon three days' notice in writing by either party.

Lucius Babcock, Judge.

[fol. 322] O. K. Suits & Disney, Chas. H. Garnett, Attorneys for Plaintiffs.

O. K. A. L. Hull, Ass't Municipal Counselor, Attorney for Defendant.

[File endorsement omitted.]

[fol. 323] Thereafter a case-made for appeal in said cause was duly prepared, served, settled and signed, filed in the trial court, withdrawn, attached to a petition in error and filed with said petition in error in the Supreme Court of

Oklahoma, all in the time and manner provided by law, the said petition in error being as follows, to wit:

[fol. 324] [File endorsement omitted]

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

No. 23,822

ROBERT W. HIGGINS, JR., JOHN T. HIGGINS, RALEIGH E. HIGGINS, Burford C. Higgins, Estella Jones nee Higgins, Cass W. Higgins, an Insane Person, by Jack Jones, his Next Friend and Duly Appointed, Qualified and Acting Legal Guardian, Eva H. McMillan, Fairy Adkins, Gertrude Koelsch nee Higgins, and Nellie Shannon nee Higgins, Plaintiffs in Error,

vs.

THE CITY OF OKLAHOMA CITY, a Municipal Corporation, Defendants in Error

PETITION IN ERROR—Filed July 6, 1932

The Plaintiffs in Error, George Noble and William Noble, complain of the Defendant in Error, the City of Oklahoma City, a municipal corporation, that it recovered a judgment in the District Court of Oklahoma County, in the State of Oklahoma, against the plaintiffs in error above named in a cause pending in said court wherein the said plaintiffs in error were plaintiffs, and the said defendant in error was defendant, and being cause No. 66,314, in said court, at the January, 1932, Term of said court, on the 9th day of January, 1932, and for that the said court on the 21st day of January, 1932, and at the same January, 1932, Term, denied and overruled the motion of the said plaintiffs in error to vacate and set aside said judgment theretofore recovered [fol. 325] by the said defendant in error in said action and to grant the said plaintiffs in error a new trial in said action.

To all of which judgment, order and action of said court the plaintiffs in error reserved exceptions, and in all of which there was manifest error on the part of said court.

And upon the overruling of their said motion for new trial as above stated, the plaintiffs in error gave notice in open court of appeal to the Supreme Court of the State of

Oklahoma from the said findings, decision, judgment and orders of the court in the said action, and requested the court to order and direct the clerk to enter their said notice of appeal upon the journal and trial docket of the court, and thereupon the court did so order.

And now the original case-made of the proceedings of said court in said cause, duly served, signed, certified, attested and filed in said court in said cause, is hereto attached, marked Exhibit A, and made a part of this petition in error.

The said plaintiffs in error aver that there was and is manifest error in the proceedings had by said court in said cause and in the said judgment and orders made and entered therein in this, to wit:

1. That the order and judgment of the said court denying and overruling the said motion of plaintiffs in error for new trial was and is erroneous and contrary to law.

[fol. 326] 2. That the findings, decision and judgment of the court in said cause was and is erroneous because not supported by the evidence.

3. That the findings, decision and judgment of the court in said cause was and is erroneous because it is contrary to the evidence.

4. That the findings, decision and judgment of the court in said cause was and is erroneous because it is contrary to the law.

5. That the said court erred in not rendering judgment upon the trial of the cause for the plaintiffs in error as prayed for by them.

6. That the said court erred in that its said decision and judgment are not supported by, but are contrary to, its findings of fact.

7. That the said court erred in admitting incompetent, irrelevant and immaterial evidence upon the trial on behalf of the defendant in error, over the objection of the plaintiffs in error.

8. That the court erred in excluding competent relevant and material evidence offered on behalf of the plaintiffs in error upon objection by the defendant in error.

Wherefore, the plaintiffs in error pray that the said order and judgment of the court made and rendered on the

21st day of January, 1932, over-ruling and denying their said motion to vacate and set aside the said judgment rendered therein on the 9th day of January, 1932, and to grant them a new trial in said action, be reversed, set aside and [fol. 327] held for naught, and that the said judgment rendered on the 9th day of January, 1932, against the said plaintiffs in error also be vacated, reversed, set aside and held for naught, and that the said court be ordered, directed and commanded to enter judgment in said cause for the plaintiffs in error for the relief prayed for in their petition in said cause, or to grant the plaintiffs in error a new trial upon the issues joined in said cause.

Libbey & Sherwin, Suits & Disney, Fred Ptak, and
Chas H. Garnett, Attorneys for Plaintiffs in Error.

[fol. 328] At this stage of the record and proceedings in the case of Higgins et al. vs. City of Oklahoma City, No. 23,822 in the Supreme Court of Oklahoma, it was consolidated with the case of Noble et al. vs. City of Oklahoma City, No. 23,821, in said Court, and the further record and proceedings in it is a consolidated record and proceedings in the two cases. This consolidated record and proceedings follows here.

[fol. 329] [File endorsement omitted]

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

No. 23,821

GEORGE NOBLE et al., Plaintiffs in Error,

vs.

CITY OF OKLAHOMA CITY, Defendant in Error

and

No. 23,822

ROBERT W. HIGGINS et al., Plaintiffs in Error,

vs.

CITY OF OKLAHOMA CITY, Defendant in Error

MOTION FOR CONSOLIDATION OF CASES—Filed March 2, 1933

Come now the plaintiffs in error in each of the above entitled cases and represent and show unto the court that

all of the principal questions and issues of fact and law in each of the above cases are the same; that while said cases were tried separately in the court below, substantially all of the record in case No. 23,821 was by stipulation introduced in evidence and made a part of the record in case No. 23,822; that the only substantial difference in the record in the two cases is in the manner in which the plaintiffs in error in the respective cases, who were also plaintiffs below, derived their claim of title to the real estate involved; that a decision in one case will almost certainly be decisive of the other; and that the briefs and argument will of necessity be the same or substantially the same in both cases.

[fol. 330] Therefore, for the reasons and upon the grounds above set forth, the plaintiffs in error in each of said cases respectfully move and ask the court to make and enter its order herein consolidating said cases for briefing, argument and decision, and authorizing the filing of a single brief by the plaintiffs in error in both cases under the title of the two cases as consolidated.

Henry L. Goddard, Suits & Disney, Fred Ptak, and Chas. H. Garnett, Attorneys for Plaintiffs in Error.

IN THE SUPREME COURT OF OKLAHOMA

ORDER GRANTING MOTION TO CONSOLIDATE—March 7, 1933

23,821—George Noble et el. v. City of Oklahoma City;
23,822—Robert W. Higgins et al. v. City of Oklahoma City;

Motion to consolidate the foregoing causes, sustained.

Fletcher Riley, Chief Justice.

[fol. 331] [File endorsement omitted]

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

No. 23821

GEORGE NOBLE et al., Plaintiffs in Error,

vs.

CITY OF OKLAHOMA CITY, Defendant in Error

Consolidated

No. 23822

ROBERT W. HIGGINS et al., Plaintiffs in Error,

vs.

CITY OF OKLAHOMA CITY, Defendant in Error

OPINION—Filed Feb. 19, 1935

(Syllabus)

1. Public Lands—Railroads—Congressional Grant to Choctaw Coal & Railway Company of Land for Right of Way and Depot Grounds—Nature of Estate Granted.

Under Act of Congress of February 18, 1888 (25 Stat. 35, as amended by Act of February 13, 1889, 25 Stat. 688), Congress granted to the Choctaw Coal & Railway Company a franchise to construct and operate a railroad in the then Indian Territory, through certain Indian lands, and through the public lands of the United States therein, and granted to said company an estate to a strip of land of the designated width contained in said act, vested in praesenti in the nature of a limited fee, to be used for the purpose of a right of way and depot grounds only, with an implied condition of reverter as to the portion of said right of way traversing public lands, to the United States, upon abandonment of such use.

[fol. 332] 2. Same—Estate Granted Held Superior to Rights of Subsequent Claimants to Public Land.

The estate so granted was superior to the rights of any person acquiring rights in said public lands subsequent to

the passage of said act, and all such persons took notice of such rights of said company, and any rights granted by the United States to such subsequent claimants were subordinate to the prior and superior rights of said company, and of the rights of the United States.

3. Same—Heirs of Original Settlers not Entitled to question Authority of United States to Grant Estate in Lands Upon Claim of Defect of Title in United States.

Under the facts existing in this case, plaintiffs cannot assert want of authority in the United States to make a valid grant of a present vested estate in said lands upon a claim of defect of title in the United States.

4. Same—Land Appropriated to Any Purpose Considered as Severed From Mass of Public Land.

Whenever a tract of land shall have once been legally appropriated to any purpose, from that moment the land thus appropriated becomes severed from the mass of public lands; and no subsequent law, or proclamation, or sale, will be construed to embrace it, or to operate upon it, although no other reservation is made of it.

5. Same—Right of Reverter Reserved to United States in Grant to Railroad not Conveyed to Patentee of Portion of Lands Under Homestead and Pre-emption Laws.

A patent issued under the homestead and pre-emption laws of the United States covering a portion of the lands granted for right-of-way purposes mentioned in syllabus 1. does not convey the right of reverter reserved to the United States.

6. Same—Estate Vested as of Date of Congressional Act Upon Actual Construction of Railroad.

Under the provisions of the above act, the actual construction of the railroad constituted the definite location of the lands to which the estate granted by the act attached, and upon such construction, said estate related back and vested as of the date of said act.

7. Same—United States not Estopped From Asserting Paramount Rights in Public Lands.

Private persons cannot, by act or contract, estop the United States from asserting its paramount rights, and exercising its dominion, over public lands or rights retained therein.

[fol. 333] 8. Same—Lands Abandoned as Right of Way Granted by Act of Congress to Oklahoma City.

Act of Congress of March 8, 1922 (42 Stat. 414) granted to the city of Oklahoma City the land abandoned as a right of way involved herein, subject to the conditions and uses set forth in said act.

Appeal from District Court, Oklahoma County: Lucius Babcock, Judge.

Actions by George Noble et al. and by Robert W. Higgins et al, against Oklahoma City. Judgement for defendant, and plaintiffs appeal. Causes consolidated. Affirmed.

Joe T. Rogers, Libby & Sherwin, Suits & Disney, Henry L. Goddard, Chas. H. Garnett, and Fred Ptak, for plaintiffs in error.

Harlan T. Deupree, Municipal Counselor, and Stokes, Jarman & Brown, for defendant in error.

OSBORN, V. C. J.:

George Noble and William Noble, heirs of Naomi Noble, deceased, brought an action in the district court of Oklahoma county against the city of Oklahoma City in ejectment and to quiet title to certain real property. A similar action was filed by Robert W. Higgins, Jr., and others, as heirs of Robert W. Higgins, deceased. The issues of law and fact in the two cases are very similar, if not identical. Such differences as exist will be hereinafter pointed out. The trial court rendered judgment in favor of the defendant in both cases, and plaintiffs appeal. The causes were consolidated in this court. The parties will be referred to as they appeared in the trial court.

[fol. 334] The property involved herein is located between First and Second streets in Oklahoma City adjacent to the principal business section of the city. For nearly 40 years the property has been used and occupied as a right of way by the Chicago, Rock Island & Pacific Railway Company and its predecessors. On December 4, 1930, the property

was abandoned by the railway company, whereupon this controversy arose.

The land upon which the city of Oklahoma City is now located was opened for settlement by proclamation of the President, pursuant to authority of Congress, on April 22, 1889. In 1890 the Oklahoma Townsite Act was passed by Congress, and thereafter trustees of the townsite of Oklahoma City were approved and the S. E. quarter of section 33, twp. 12 N., R. 3 W., was patented to said trustees for the use and benefit of the occupants of the townsite. Thereafter, the trustees executed a deed to lot 6, in block 36, in Oklahoma City to Naomi Noble. The plaintiffs, George Noble and William Noble, are the sole heirs of Naomi Noble, now deceased.

Robert W. Higgins, Jr., and the other plaintiffs are the heirs of R. W. Higgins, deceased, who received a homestead patent direct from the government as a settler on the S. W. quarter of section 33, twp. 12 N., R. 3 W.

On February 18, 1888, Congress granted certain rights to the Choctaw Coal & Railway Company (25 Stats. 35). The pertinent provisions giving rise to this controversy are as follows:

[fol. 335] "An act to authorize the Choctaw Coal and Railway Company to construct and operate a railway through the Indian Territory, and for other purposes.

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Choctaw Coal and Railway Company, a corporation, created under and by virtue of the laws of the state of Minnesota, be, and the same is hereby, invested and empowered with the right of locating, constructing, owning, equipping, operating, using, and maintaining a railway and telegraph and telephone line through the Indian Territory, beginning at a point on Red river (the southern boundary line, at the bluff known as Rocky Cliff in the Indian Territory, and running thence by the most feasible and practicable route through the said Indian Territory to a point on the east boundary line, immediately contiguous to the west boundary line of Polk or Sevier counties in the state of Arkansas; also, a branch line of railway to be constructed from the most suitable point on said line for obtaining a feasible and practicable route in a northwesterly direction to the leased coal veins of said Choctaw

Coal and Railway Company in Tobucksey county, Choctaw Nation; with the right to construct, use, and maintain such tracks, turnouts, branches, and sidings and extensions as said company may deem it in their interest to construct along and upon the right of way and depot grounds herein provided for.

"Sec. 2. The said corporation is authorized to take and use for all purposes of railway, and for no other purposes, a right of way one hundred feet in width through said Indian Territory for said main line and branch of the Choctaw Coal and Railway Company; and to take and use a strip of land two hundred feet in width, with a length of three thousand feet, in addition to right of way, for stations, for every ten miles of road, with the right to use such additional ground where there are heavy cuts or fills as may be necessary for the construction and maintenance of the road-bed, not exceeding one hundred feet in width on each side of said [fol. 336] right of way, or as much thereof as may be included in said cut or fill: Provided, That no more than said addition of land shall be taken for any one station: Provided, further, That no part of the lands herein authorized to be taken shall be leased or sold by the company, and they shall not be used except in such manner and for such purposes only as shall be necessary for the construction and convenient operation of said railroad, telegraph and telephone lines; and when any portion thereof shall cease to be so used, such portion shall revert to the nation or tribe of Indians from which the same shall be taken.

"Sec. 3. That before said railway shall be constructed through any lands held by individual occupants according to the laws, customs, and usages of any of the Indian nations or tribes through which it may be constructed, full compensation shall be made to such occupants for all property to be taken or damage done by reason of the construction of such railway. In case of failure to make amicable settlement with any occupant such compensation shall be determined by the appraisement of three disinterested referees, to be appointed. * * *

"Sec. 10. That the said Choctaw Coal and Railway Company shall accept this right of way upon the express condition, binding upon itself, its successors and assigns, that they will neither aid, advise, nor assist in any effort looking

towards the changing or extinguishing the present tenure of the Indians in their land, and will not attempt to secure from the Indian nations any further grant of land, or its occupancy, than is hereinabove provided: Provided, That any violation of the conditions mentioned in this section shall operate as a forfeiture of all the rights and privileges of said railway company under this act."

On February 13, 1889, the Act was amended (25 Stats. 668) authorizing the construction of a road from Tobucksey county (near Hartshorne, Pittsburg County) to an intersection with the Atchison, T. & S. F. Railway at the most convenient point between Halifax Station and Ear creek [fol. 337] (near the present town of Goodwell).

Thereafter certain other acts were passed extending the time for the construction of the railroad, which are immaterial to the present controversy.

Pursuant to the above acts of Congress, the Choctaw Coal & Railway Company surveyed and located its line, the location crossing the real estate involved herein.

In March, 1905, pursuant to permission of Congress, the Chicago, Rock Island & Pacific Railway Company became the lessee and assignee of the rights of the Choctaw Coal & Railway Company for a period of 999 years, which company operated the line of railway until December 4, 1930, at which time, by permission, the line of railway on the property herein involved was abandoned and quitclaim deeds were executed by the railway company to the city. On December 5, 1930, an action was instituted in the United States District Court entitled "City of Oklahoma City v. Chicago, Rock Island & Pacific Railway Company and Choctaw, Oklahoma & Gulf Railway Company," by which it was adjudged and decreed that on December 4, 1930, the railway company had abandoned the right of way and property involved herein and by virtue of an Act of Congress of March 8, 1922 (42 Stat. 414), all the right, title, and interest in and to said property became vested in the defendant city. The plaintiffs were not parties thereto.

Evidence was introduced on behalf of plaintiffs, George Noble and William Noble, showing that on March 28, 1891, Naomi and George Noble executed to the Choctaw Coal & Railway Company a deed to 40 feet off of the north end of

[fol. 338] lot 6 in block 36, of the city of Oklahoma City, which contained the following reversionary clause:

"'Being intended for the use and occupation of said party (grantee), its successors and assigns, as and for its right of way for the constructing, operation, and maintenance of its railroad and business at or upon the land hereby released and quitclaimed: Provided, that in case of abandonment of said premises by said second party, its successors or assigns for the purposes above mentioned, the same shall revert to the grantors, their heirs or assigns.''

The property conveyed by the deed is the property involved herein.

On behalf of the Higgins heirs it is shown that on March 24, 1898, a right-of-way deed was executed by R. W. Higgins and wife to the Choctaw, Oklahoma & Gulf Railway Company conveying to said company the property involved herein, which is now claimed by the Higgins heirs, the habendum clause containing the following recital:

"To have and to hold the same by the said Choctaw, Oklahoma & Gulf Railroad Company, together, with all and singular the rights, privileges, and appurtenances thereunto belonging and all the rights and privileges which said company is authorized to have, hold and exercise under and by virtue of the Act of Congress granting the Choctaw Coal & Railway Company a right of way through the Indian Territory, approved February 18, 1888, and subsequent acts of Congress amending and extending said act together with all the rights and privileges granted unto said Choctaw, Oklahoma & Gulf Railroad Company by an Act of Congress approved August 24, 1894, and the Act of Congress approved April 24, 1896, and unto its successors, and assigns forever.''

It is further shown that some condemnation proceedings were had in which certain other property was condemned [fol. 339] by the railroad company and the damages awarded and paid under the condemnation proceedings. The necessity for the execution of these deeds and the condemnation proceedings arose in the following manner. When the property involved herein was opened for public settlement on April 22, 1889, the right of way of the railroad company was staked off through the town site and an

effort was made to prevent the settlers from staking claims on the right-of-way property. Disputes between the railroad company and the settlers arose over the right-of-way property and the work of construction was delayed. As originally staked off, the right of way took a diagonal course across the town site. Certain negotiations between the company officials and a citizens committee resulted in a relocation of the right of way running directly through the town site parallel with the lots. The right of way first staked off was abandoned and a new right of way located in the alley between first and second streets. It was sought to float a bond issue to secure funds to purchase the right of way for the company, but the project failed when the President vetoed an act of Congress approving the issuance of said bonds. Thereafter other arrangements were made and the necessary funds were secured by the committee of citizens and 40 feet off the south end of the north lots and 40 feet off the north end of the south lots were secured by agreement with the owners either by deed or condemnation, and upon this right of way the railroad lines were constructed.

At the very threshold we are confronted with the nature of the right, privilege, or estate granted by the above-[fol. 340] quoted act to the Choctaw Coal & Railway Company, it being contended by defendant that a right of way in the nature of a base or determinable fee, with possibility of reverter in case of nonuser, was granted by said act. But plaintiffs contend that only a franchise was granted to said railway company to acquire a right of way over said lands, and that Congress was without authority to grant more than a mere right to exercise the sovereign power of eminent domain for the reason that at the time of the passage of said act said lands belonged to the Creek Tribe of Indians, or at least that the Creek Tribe of Indians had an interest therein, which Congress was without authority to impair.

We are cited by plaintiffs to a number of treaties between the United States and the Creek Nation dating from January 24, 1826, which by their terms propose to secure and guarantee to the Creek Nation a large domain of land, including the lands in controversy herein, and to cause a patent, should the nation so require, to be executed to said Creek Nation subject to certain conditions. On June 14,

1866, a treaty was entered into between the United States and the Creek Nation with which we are immediately concerned. (14 Stat. 785, 1 Kapler, 931.) By the terms thereof the Creek Nation, for a certain consideration and for certain specified purposes, ceded and conveyed to the United States the west half of said domain (in which the lands involved herein were included) "to be sold to and used as homes for such other civilized Indians as the United States [fol. 341] might choose to settle thereon". The United States did not have occasion to use said lands for such purposes, and on January 19, 1889, a further treaty was entered into with the Creek Nation whereby said nation ceded and granted to the United States "without reservation or condition full and complete title to the entire western half of the domain * * * and also grants and releases to the United States all and every claim, estate, right, or interest of any and every description in or to any and all land and territory whatever, except. * * *" Said treaty was ratified by the council of the Creek Nation on January 31, 1889, and by the Congress on March 1, 1889. Although the Railway Act above mentioned was passed on February 18, 1888, in any event the United States became invested with full title free from restrictions by the approval of the treaty on March 1, 1889. By Act of Congress of March 2, 1889 (25 Stats. 1004), Congress authorized the opening of said lands for settlement as a part of the public lands, and thereafter by proclamation of the President, dated March 23, 1889, pursuant to Congressional Act, April 22, 1889, at 12:00 o'clock noon was appointed as the time when settlers might exercise certain rights granted under the provisions of the Act of March 2, 1889, to settle upon said lands and eventually to obtain title thereto. The Creek Nation did not complain of the act of Congress in this respect, and by the provisions of the treaty above mentioned said nation waived all of its rights in and to said lands and ceded and granted such rights to the United States. In this connection it is worthy of note that, by the Act of March 2, 1889, Congress [fol. 342] made specific provision that the release and extinguishment of the Indian rights "shall not inure to the benefit of or cause to vest in any railroad company any right, title or interest whatever in or to any of said land * * * except rights of way and depot grounds. * * *" Recognition was thereby given to any rights granted under the Act of February 18, 1888. On February 13, 1889, Con-

gress passed an amendatory act, granting additional rights to said railway company, thereby recognizing the force and effect of their previous enactment. By the Organic Act (26 Stat. 81, approved May 2, 1890) it was again provided, "No part of the land embraced within the territory hereby created shall inure to the use or benefit of any railroad corporation, except the rights of way and land for stations heretofore granted to certain railroad corporations." Sec. 18.) On February 21, 1891, Congress passed an act extending the time for construction of the road (26 Stats. 765), and on January 22, 1894, a similar act was passed granting a further extension. (28 Stats. 27.)

Plaintiffs rely upon the case of Cherokee Nation v. Southern Kansas Ry. Co., 135 U. S. 641, 34 L. Ed. 295, 10 Sup. Ct. 965. Said case is clearly distinguishable from the case at bar.

With all of the congressional recognition of the rights of the railroad company, both prior and subsequent to the attachment of any rights of plaintiffs, it is clear that plaintiffs, after the lapse of 40 years, cannot claim a want of title in the United States to defeat whatever rights were granted, recognized, and acquiesced in by the Congress, the [fol. 343] public, and the predecessors in title of the plaintiffs.

We pass now to a consideration of the nature of the estate granted the railway company by the Act of 1888, supra. But before entering upon said discussion we deem it proper to allude to the surrounding facts and circumstances and the fixed policy of the government relating to the construction of railroads in the vast unoccupied public domain. It had long been the fixed policy of Congress, in recognition of the inestimable aid of an adequate system of transportation to the interior development of the country, to give assistance to the building of railroads through undeveloped territory, not only by granting rights of way without compensation to the government therefor, but also by granting large tracts of public lands not necessary for actual use in the construction, maintenance, and operation of the railroad, which lands could be sold by said railroads to pioneer settlers. That Congress had the undisputed right to dispose of the public lands as it saw fit and proper is well recognized. Ruddy v. Rossi, 248 U. S. 104, 29 S. Ct. 46, 63 L. Ed. 148.

We call attention at this time also to a well-known rule of construction of congressional grants that the acts of Congress by which said grants are made constitute legislative enactments as well as conveyances of the rights granted, and that such effect must be given thereto as will carry out the legislative intent. In the case of United States v. Southern Pacific Railroad Company, 146 U. S. 570, 36 L. Ed. 1091, 13 S. Ct. 152, it is said:

[fol. 344] "Illy as it may accord with the common-law notion of identification of tracts as essential to a valid transfer of title, it is fully settled that we are to construe these acts of Congress as laws as well as grants; that Congress intends no scramble between companies for the grasping of titles by priority of location, but that it is to be regarded as though title passes as of the date of the act, and to the company having priority of grant, and, therefore, that in the eye of the law it is now as though there never was a period of time during which any titles to these lands was in the Southern Pacific."

In the case of Missouri, K. & T. R. R. Co. v. Kansas Pac. R. R. Co., 97 U. S. 491, 497, 24 L. Ed. 1095, 1097, it is said:

"It is always to be borne in mind, in construing a congressional grant that the act by which it is made is a law as well as a conveyance, and that such effect must be given to it as will carry out the intent of Congress. That intent should not be defeated by applying to the grant the rules of the common law which are properly applicable only to transfers between private parties. To the validity of such transfers it may be admitted that there must exist a present power of identification of the land; and that where no such exists, instruments with words of present grant are operative, if at all, only as contracts to convey. But the rules of common law must yield in this, as in all other cases, to the legislative will."

Plaintiffs contend that the act of 1888 did not create a grant in præsenti of a right of way, but merely granted a franchise to the railway company to acquire a right of way by purchase or by condemnation, and that no right or title vested until said right of way had been taken and paid for as provided by the act. Turning our attention to the act itself, we note that by section 1 *of* the railway company is

"invested and empowered with the right of locating, con- [fol. 345] structing, * * * a railway" between fixed termini "by the most feasible and practicable route * * * with the right to construct * * * such tracks * * * upon the right of way and depot grounds herein provided for." By section 2 said corporation "is authorized to take and use for all purposes of railway, and for no other purpose, a right of way 100 feet in width through said Indian Territory. * * *"

The question presented has had much judicial consideration in strikingly similar cases.

In the case of St. Joseph, Denver City R. R. Co. v. Baldwin, 103 U. S. 426, 26 L. Ed. 578, the court was concerned with a controversy arising over a grant to the railroad company of a right of way in the state of Kansas. The act was dated July 23, 1866 (14 Stat. 210). The line of road was not definitely located until October, 1871, and Baldwin acquired his rights in October, 1869. He contended that the company had no vested right to the right of way until the line was located, and the trial court and the state Supreme Court adopted his view. The Supreme Court of the United States, however, took the opposite view, holding as follows:

"The Act of Congress of July 23, 1866, ch. 212, granting to the state of Kansas for the benefit of the St. Joseph & Denver City Railroad Company, the right of way over public lands, is a present absolute grant.

"All persons acquiring any portion of the public lands after the passage of the act in question took the same subject to the right of way conferred by it for the proposed road."

The territorial Supreme Court, at its January, 1896, term, decided the case of Churchill v. Choctaw Railway Company, [fol. 346] 4 Okla. 462, 46 P. 503. In that case the company claimed a right of way over the property of Churchill by virtue of the grant contained in the Act of 1888, supra. Churchill had made a homestead entry on the land on April 30, 1889. On July 13, 1889, the company filed its map showing the route over Churchill's property. It was sought by injunction to prevent the railway company from entering upon the land without paying compensation. The court followed the Baldwin Case and decided the issues in favor of the railway company. Therein it is said:

"An act of Congress investing and empowering a railway company with the right of way of locating, constructing, owning, equipping, operating, using and maintaining a railway through and over public land and providing that said company is authorized to take and use for all purposes of a railroad right of way over said public land is a present absolute grant.

"A homestead settlement subsequent to such an act is subject to the rights of the railway company, although the line of the road was not definitely located until after the entry, and the settler cannot recover for damages necessarily occasioned by the building of the railway under said act."

In Northern Pacific Ry. Co. v. Townsend, 190 U. S. 267, 23 S. Ct. 671, 47 L. Ed. 1044, the court said:

"Following decisions of this court construing grants of rights of way similar in tenor to the grant now being considered (New Mexico v. United States Trust Co., 172 U. S. 171, 19 S. Ct. 128, 43 L. Ed. 407; Railroad Co. v. Baldwin, supra), it must be held that the fee passed by the grant made in section 2 of the Act of July 2, 1864."

The court proceeds to explain the kind of title passed by said grant, and stated that the grant was for a specified pur- [fol. 347] pose, and could not be voluntarily alienated. The court then said:

"The substantial consideration inducing the grant was the perpetual use of the land for the legitimate purpose of the railroad, just as though the land had been conveyed to have and to hold the same so long as it was used for the railroad right of way. In effect, the grant was of a limited fee made on an implied condition of reverter in the event that the company ceased to use or retain the land for the purpose for which it was granted."

In the case of New Mexico v. United States Trust Co., 172 U. S. 171, 19 S. Ct. 128, 43 L. Ed. 407, the court was dealing with a grant similar to that involved herein. In answering the contention that the grant constituted an easement rather than a fee, it was said:

"But, if it may not be insisted that the fee was granted, surely more than an ordinary easement was granted, one

having the attributes of the fee, perpetuity and exclusive use and possession; also the remedies of the fee, and, like it, corporeal, not incorporeal property."

In the case of Rio Grande Railway Company v. Stringham, 239 U. S. 44, 36 S. Ct. 5, 60 L. Ed. 136, the court said that the right of way granted by a certain act of Congress is neither a mere easement nor a fee simple absolute, but a limited fee made on an implied condition of reverter in the event that the company ceases to use or retain the land for the purpose for which it is granted, and carries with it the incidents and remedies usually attending the fee, citing New Mexico v. United States Trust Co., 172 U. S. 171, 183; Northern Pac. Ry. Co. v. Townsend, supra; United States v. Michigan, 190 U. S. 540.

[fol. 348] Plaintiffs rely on the case of Smith v. Townsend, 148 U. S. 460, 13 S. Ct. 634, 37 L. Ed. 533, where in the body of the opinion it is said that under a certain Act of Congress of July 4, 1884 (23 Stat. 73, ch. 179), there was granted to the Atchison, T. & S. F. Ry. Company a mere right of way, and the fee continued in the Indians. So far as the immediate controversy is concerned, it is not necessary to direct attention to the specific terms of the congressional grant, it being sufficient to say the question involved in the case was whether or not an employee of the Atchison, T. & S. F. Ry. Company residing on the right-of-way property up to and on the 22nd day of April was thereby disabled from making a homestead entry on a tract of land subject to entry. The nature of the estate of the railway company in and to the right-of-way property was merely incidental to the question before the court, and the discussion in the opinion relating to such issue is dictum. If it could be said that such statement rises to the dignity of an adjudication, it would be contrary to the overwhelming weight of authority. The rule announced in the Baldwin Case and by the territorial Supreme Court is supported by the following federal and state authorities: Stalker v. Oregon Short Line, 225 U. S. 142, 32 S. Ct. 636, 56 L. Ed. 1027; affirming Oregon Short Line R. Co. v. Stalker, 14 Idaho, 362, 94 P. 56; Choctaw, Oklahoma & Gulf Ry. Co. v. Mackey, 256 U. S. 531, 41 S. Ct. 582, 65 L. Ed. 1076; Union Pac. R. R. Co. v. Laramie, Stock Yards, 231 U. S. 190, 34 S. Ct. 101, 58 L. Ed. 179; Northern Pac. R. R. Co. v. Ely, 197 U. S. 1, 49 L. Ed. 639; Northern Pac. Ry. Co.

v. Hasse, 197 U. S. 9, 25 S. Ct. 305, 49 L. Ed. 642; James-
[fol. 349] town & Northern R. Co. v. Jones, 177 U. S. 125, 20 S. Ct. 568, 44 L. Ed. 698; Noble River L. R. Co., 147 U. S. 165, 13 S. Ct. 271, 37 L. Ed. 123; Denver & R. G. R. Co. v. Alling, 99 U. S. 463, 25 L. Ed. 438; Missouri, K. & T. Ry. Co. v. U. S., 47 Ct. Cl. 59; Missouri, K. & T. Ry. Co. v. Watson, 24 Kan. 494, 87 P. 687; Bowman v. McGoldrick Lmbr. Co. (Idaho) 219 P. 1063; Northern P. Ry. Co. v. Pyle, 19 Idaho, 3, 1112 P. 678; Regan v. Boyd, 59 Mont. 453, 197 P. 832; Northern P. Ry. Co. v. McDonald, 91 Wash. 113, 157 P. 222.

Plaintiffs argue that the language used in the granting clauses of some of the above acts is substantially different from the language used in the Act of 1888, that the words "take and use" are peculiar to the act involved herein and are indicative of a purpose to grant only the right to acquire a right of way. The court in the case of Churchill v. Choctaw Railway Co., supra, adopted the view contrary to plaintiffs' contention and approved the rule announced in the various cases herein quoted. It plainly appears that there was a legislative intention to make an absolute grant of a right of way. Subsequent legislation on the subject after the land was acquired by the United States in fee simple recognized the existence of a previous grant. We are impelled to conclude that the territorial Supreme Court arrived at a correct conclusion as to the nature of the estate granted by the act under consideration.

Having determined that a grant in praesenti was made by the act under consideration, we are confronted with the relative rights of the railroad company and settlers upon [fol. 350] the public domain prior to the actual location of the railroad on the granted lands. This question has been set at rest, however, by the Supreme Court of the United States in the case of St. Joseph & Denver City Railroad Co. v. Baldwin, supra, wherein the distinction is noted between the grant of a right of way and the grant of lands in aid of construction. Therein it is said:

"The right of way for the whole distance of the proposed route was a very important part of the aid given. If the company could be compelled to purchase its way over any section that might be occupied in advance of its location,

very serious obstacles would be often imposed to the progress of the road. For any loss of lands by settlement or reservation other lands are given, but for the loss of the right of way by these means, no compensation is provided, nor could any be given by the substitution of another route.

"The uncertainty as to the ultimate location of the line of the road is recognized throughout the act, and where any qualification is intended in the operation of the grant of lands, from this circumstance, it is designated. Had a similar qualification upon the absolute grant of the right of way been intended, it can hardly be doubted that it would have been expressed. The fact that none is expressed, is conclusive that none exists.

"We see no reason, therefore, for not giving to the words of present grant, with respect to the right of way, the same construction which we should be compelled to give, according to our repeated decisions, to the grant of lands had no limitation been expressed. We are of opinion, therefore, that all persons acquiring any portion of the public lands, after the passage of the act in question, took the same subject to the right of way conferred by it for the proposed road."

The above case was quoted from and followed by the [fol. 351] Supreme Court of the United States in the later case of Bybee v. Oregon & Cal. Ry. Co. (1891) 139 U. S. 663, 11 S. Ct. 641, 35 L. Ed. 305, and Nadeau v. Union Pac. R. R. Co. (1920) 253 U. S. 442, 40 S. Ct. 570, 64 L. Ed. 1003. See, also, Northern Pac. R. R. Co. v. Ely, 197 U. S. 1, 25 S. Ct. 302, 49 L. Ed. 639; Northern Pac. R. R. Co. v. Hasse, 197 U. S. 9, 25 S. Ct. 305, 49 L. Ed. 642; North Chicago St. Ry. Co. v. Chicago Union Traction Co., 150 Fed. 612; Stuart v. Pacific Ry. Co., 178 Fed. 753, 227 U. S. 342, 33 S. Ct. 338, 57 L. Ed. 535.

It is conceded that upon abandonment by the railroad company its title terminated. We must determine, however, whether or not the reverter inured to the United States or passed by the government patent issued to plaintiff's predecessors. In this connection we direct attention to the recognized rule of construction of the title granted by patents issued by the officials of the government pursuant to congressional authority. No official can transcend the congressional authority pursuant to which such patent is issued, and every such patent must find unmistakable au-

thority from Congress to dispose of the right or estate attempted to be conveyed. This is an important rule of construction, oft pronounced and uniformly recognized. If said interests in the public domain have been withdrawn by congressional act from the operation of subsequent enactments, no act of any official, of whatever rank, is effective to override the congressional limitation.

The rule announced in the early history of our jurisprudence in the ancient case of Wilcox v. Jackson, 13 Pet. 498, wherein the court said:

[fol. 352] "Whenever a tract of land shall have once been legally appropriated to any purpose, from that moment the land thus appropriated becomes severed from the mass of public lands; and no subsequent law, or proclamation, or sale, would be construed to embrace it, or to operate upon it, although no other reservation were made of it."

In Leavenworth, Lawrence & Galveston Ry. Co. v. United States, 92 U. S. 733, 23 L. Ed. 634, the Supreme Court of the United States had under consideration a grant of lands to the state of Kansas in alternate sections. Prior to said grant certain lands were occupied by the Osage Indians under a treaty previously entered into with the United States. The Governor of the state of Kansas, construing the wording of the grant as broad enough to include alternate sections of land, issued patents thereto regardless of the occupancy by the Osage Indians, whereupon the government instituted suit to cancel said patents as to lands so occupied. In the body of the opinion the court said:

"The main question in R. Co. v. Litchfield, 23 How. 66, 16 L. Ed. 500, was whether a grant to the territory of Iowa, to aid in the improvement of the navigation of the Des Moines river, extended to lands above the Raccoon fork, or was confined to those below it, the court, in deciding it, says: 'All grants of this description are strictly construed against the grantee; nothing passes but what is conveyed in clear and explicit language; and as the right here claimed are derived entirely from the act of Congress, the donation stands upon the same footing of a grant by the public to a private company, the terms of which must be plainly expressed in the statute, and, if not thus expressed, they cannot be implied.'

"This grant, like that to Iowa, was made for the purpose of aiding a work of internal improvement, and does not extend beyond the meaning and intent expressed in it. It [fol. 353] should be either enlarged by ingenious reasoning or diminished by strained construction. The construction must be reasonable and such as will give effect to the intention of Congress. This is to be ascertained from the terms employed, the situation of the parties, and the nature of the grant. If these terms are plain and unambiguous, there can be no difficulty in interpreting the act, but if they admit of different meanings—the one of extension, and the other of limitation—they must be accepted in a sense most favorable to the grantor. And if a right be asserted against the government, it must be so clearly defined that there can be no question of the purpose of Congress to confer it. In other words, what is not given expressly, or by necessary implication, is withheld. * * *

"Only the public lands owned absolutely by the United States are subject to survey and division into sections, and to these lands this grant is applicable. It embraces such as could be sold and enjoyed, and not those which the Indians, pursuant to treaty stipulations, were left free to occupy. * * *

"And such grants could be treated in no other way, for Congress cannot be suposed to have thereby intended to include lands previously appropriated to another purpose, unless there be an express declaration to that effect. A special exception of them was not necessary, because the policy which dictated the grants confined them to lands which Congress could rightfully bestow, without disturbing existing relations and producing vexatious conflicts. The legislation which reserved them for any purpose excluded them from disposal in the manner that the public lands are usually disposed of. * * *

"'A thing which is within the letter of the statute is not within the statute unless it be within the intention of the makers.' * * *

"Every tract set apart for some special use is preserved to the government to enable it to enforce that use. And there is no difference, in this respect, whether it be appropriated for Indian occupancy, or for other purposes. [fol. 354] There is an equal obligation resting on the government to see that neither class of reservation is diverted from the uses to which it was assigned."

In St. Louis Smelting, etc., Co. v. Kemp, 104 U. S. 636, 26 L. Ed. 745, the court said:

"Of course, when we speak of the conclusive presumptions attending a patent for lands, we assume that it was issued in a case where the department had jurisdiction to act and exercise it; that is to say, in a case where the land belonged to the United States, and provision had been made by law for their sale. If they never were public property, or had previously been disposed of, or if Congress had made no provision for their sale, or had reesrved them, the department would have no jurisdiction to transfer them, and its attempted conveyance of them would be inoperative and void, no matter with what seeming regularity the forms of law may have been observed."

In the case of Burfenning v. Chicago, St. Paul, etc., Ry. Co., 163 U. S. 321. 16 S. Ct. 1018, 41 L. Ed. 175, Mr. Justice Brewer said:

"It has undoubtedly been affirmed over and over again that, in the administration of the public land system of the United States, questions of fact are for the consideration and judgment of the Land Department, and that its judgment thereon is final. Whether, for instance, a certain tract is swamp land or not, saline land or not, mineral land or not, presents a question of fact not resting on record, dependent on oral testimony, and it cannot be doubted that the decision of the Land Department, one way or the other, in reference to these questions is conclusive and not open to relitigation in the courts, except in those cases of fraud, etc., which permit any determination to be re-examined. Johnson v. Towsley, 13 Wall. (U. S.) 72, 20 L. Ed. 485, Steel v. Smelting Co., 106 U. S. 447, 1 S. Ct. 389, 27 L. Ed. 226; Wright v. Roseberry, 121 U. S. 488, 7 S. Ct. 985, 30 L. Ed. 1039; Heath v. Wallace, 138 U. S. 573, 11 S. Ct. 380, 34 L. Ed. [fol. 355] 1063; McCormick v. Hayes, 159 U. S. 332, 16 S. Ct. 37, 40 L. Ed. 171. But it is also equally true that, when by act of Congress a tract of land has been reversed from homestead and pre-emption, or dedicated to any special purpose, proceedings in the Land Department in defiance of such reservation or dedication, although culminating in a patent, transfer no title, and may be challenged in an action at law. In other words, the action of the Land Department cannot override the expressed will of Congress,

or convey away public lands in disregard or defiance theerof. Wright v. Roseberry, supra; Doolan v. Carr, 125 U. S. 618, 8 S. Ct. 1228, 31 L. Ed. 844; Davis, Adm'r, v. Widbold, 139 U. S. 507, 529, 11 S. Ct. 628, 35 L. Ed. 238; Knight v. U. S. Land Ass'n, 142 U. S. 161, 12 S. Ct. 258, 35 L. Ed. 974."

The doctrine announced in the Wilcox v. Jackson Case, supra, has been widely quoted and followed: Witherspoon v. Duncan, 4 Wall. 210, 218; Chotard v. Pope, 12 Wheat. (U. S.) 586; Carroll v. Stafford, 3 How. (U. S.) 44; Buttz v. Northern Pac. Ry. Co. 119 U. S. 55; Kansas, Pac. Ry. Co. v. Dunnmeyer, 113 U. S. 629; Hastings & Dakota Ry. Co. v. Whitney, 132 U. S. 357; Whitney v. Taylor, 158 U. S. 85, 15 S. Ct. 796, 39 L. Ed. 906; Sioux City & Iowa Falls Land Co. v. Griffey, 143 U. S. 32, 12 S. Ct. 362, 36 L. Ed. 64; United States v. Southern Pac. Ry. Co., 146 U. S. 570, 13 S. Ct. 152, 36 L. Ed. 1091; Northern Pac. R. R. Co. v. Trodick, 221 U. S. 208, 31 S. Ct. 607, 55 L. Ed. 704; Tarpey v. Madsen, 178 U. S. 215, 20 S. Ct. 849, 44 L. Ed. 1042; St. Paul, Minnesota & Manitoba Ry. Co. v. Donahue, 210 U. S. 21, 28 S. Ct. 600. See the following cases from the territorial Supreme Court; Enid & Anadarko Ry. Co. v. Kephart, 19 Okla. 1, 91 P. 1049; McMichael v. Murphy, 12 Okla. [fol. 356] 155, 70 P. 189; Hodges v. Colcord, 12 Okla. 313, 70 P. 383; Holt v. Murphy, 15 Okla. 12, 79 P. 265. See the following decisions from the Land Department; Whitney v. Maxwell 2nd Land Dec. Dep. Int. 98; Schrotberger v. Arnold, 6th Land Dec. Dep. Int. 425; Allen v. Curtiss, 7th Land Dec. Dep. Int. 444; Faulkner v. Miller, 16th Land Dec. Dep. Int. 130.

Much litigation has had the attention of the state courts and the federal courts, including the Supreme Court of the United States, relating to the obtaining of title by individuals to land granted by Congress to railroad companies for right of way from said railroad companies either by voluntary conveyance or by adverse user for such length of time as under the state law title arose by prescription. A great contrariety of conflicting decisions ensued in the various states. Said question was set at rest in 1898 by the Supreme Court of the United States in the case of Northern Pac. R. R. Co. v. Smith, 171 U. S. 260, 18 S. Ct. 794, 43 L. Ed. 157, which case was followed by the case of Northern Pacific Ry. Co. v. Townsend, 190 U. S. 267; wherein the court used the following language:

"Nor can it be rightfully contended that the portion of the right of way appropriated was not necessary for the execution of the powers conferred by Congress, for, as said in Northern Pacific R. R. Co. v. Smith, 171 U. S. 261, 275, speaking of the very grant under consideration: 'By granting a right of way four hundred feet in width, Congress must be understood to have conclusively determined that a strip of that width was necessary for a public work of such importance.' Neither courts nor juries, therefore, nor the [fol. 357] general public, may be permitted to conjecture that a portion of such right of way is no longer needed for the use of the railroad and title to it has vested in whomsoever chooses to occupy the same. The whole of the granted right of way must be presumed to be necessary for the purposes of the railroad, as against a claim by an individual of an exclusive right of possession for private purposes.

"To repeat, the right of way was given in order that the obligations to the United States assumed in the acceptance of the act might be performed. Congress having plainly manifested its intention that the title to and possession of the right of way should continue in the original grantee, its successors and assigns, so long as the railroad was maintained, the possession by individuals of portions of the right of way cannot be treated without overthrowing the act of Congress as forming the basis of an adverse possession which may ripen into a title good as against the railroad company."

It will thus be seen that the judicial construction given to the various acts granting rights of way to railroad companies recognized a public use and proprietary interest on the part of the government of the United States in the character of title remaining in said land which had been granted for right of way purposes to the various railroads. By many enactments unnecessary to delineate more specifically herein, Congress had assumed to exercise a certain limited control over said lands which had been conveyed or which had not been actually used for right-of-way purposes culminating in the passage of the Act of Congress of April 28, 1904 (33 Stats. 538), of May 25, 1920 (41 Stat. 621), and of March 8, 1922 (42 Stats. 414), which latter act will be hereinbefore referred to.

As heretofore pointed out, the various acts relating to [fol. 358] the opening of the country for settlement and the

proclamation of the President specifically recognize prior grants for rights of way and depot grounds to railroad companies. The judicial and legislative constructions were numerous and well established as to other grants of right of way. By section 2 of the act, supra, it was provided that when any portion of the lands so granted ceased to be used for railway purposes, the same should revert to the nation or tribe of Indians from which same was taken. The United States succeeded to all the rights of the Creek Nation by treaty. We have searched in vain to find express authority granted to any government official authorized to issue patents to convey to the homestead settler this right of reverter to the United States, and under the well-established judicial decisions we are not at liberty to imply such power and authority. We therefore conclude that the right of reverter under the act under consideration in this case inured to the benefit of the United States and not to the patentee of lands under the various homestead and pre-emption acts of Congress.

It is contended by plaintiffs, however, that the railroad company abandoned a portion of its right of way as granted by Congress under the Act of 1888, and substituted in lieu thereof a purchased right of way over lands of plaintiffs' predecessors, and that having accepted right-of-way deeds from plaintiffs' predecessors, the railroad company and its successors in title, the city, are estopped from asserting an adverse title to the title of plaintiffs. In this connection the record discloses that the railroad company made a survey [fol. 359] of its proposed route diagonally through the section of land wherein the lands involved herein are located. A map of said location was filed with the Secretary of the Interior on July 13, 1889, and approved by him. The plaintiffs assert that their rights had their inception in occupancy on April 22, 1889. It is asserted by defendant city in its brief, and not denied by plaintiffs, that all of the lands involved herein granted by the Noble heirs were in fact embraced in the original survey; but it is conceded that as to the Higgins heirs, although the preliminary survey crossed the quarter section of land eventually patented to their ancestor, the identical strip of land involved herein was not embraced within the original survey nor shown on said approved map.

In discussing the question, we turn to the act itself to analyze some of its provisions. By section 3, quoted,

supra, the railroad company is required to make full compensation to "individual occupants according to the laws, customs and usages of any of the Indian Nations or Tribes * * * for all property to be taken or damage done by reason of the construction of such railroad." In case of controversy over said compensation a form of condemnation proceedings is provided by said act. By section 5, said railroad company is required to pay to the Secretary of the Interior for the benefit of the particular nations or tribes through whose lands the railroad may be located the sum of $50 for each mile of railroad and a further sum of $15 per mile per annum, required as rental to be paid in like manner to said tribe during the continuance of the Indian [fol. 360] title. Compensation for any others than those designated is not provided for, and such compensation is therefore withheld. Section 6 of the act provides:

"That said company shall cause maps showing the route of its located lines through said territory to be filed in the office of the Secretary of the Interior, and also to be filed in the office of the principal chief of each of the nations or tribes through whose lands said railway may be located; and after the filing of said maps no claim for a subsequent settlement and improvement upon the right of way shown by said maps shall be valid as against said company; Provided, that when a map showing any portion of said railway company's located line is filed as herein provided for, said company shall commence grading said located line within six months thereafter, or such location shall be void; and said location shall be approved by the Secretary of the Interior in sections of twenty-five miles before construction of any such section shall be begun."

The purpose of filing said map and the right of the railroad company under the act of 1888 to construct its line between the fixed termini along the most feasible and practicable route had judicial consideration in the early case of United States ex rel. Search et al, v. Choctaw, Oklahoma & Gulf Ry. Co., 3 Okla. 404, 41 P. 729. Mr. Justice McAtee, on behalf of the court, prepared a very lengthy and exhaustive opinion wherein the authority of the Secretary of the Interior in approving the map and its affects upon the rights of the railroad company were discussed at length. The facts giving rise to said discussion were that the railroad company filed a map showing the location of its line of

railroad near the town of Tecumseh, which map was duly approved. Thereafter, the company determined to change [fol. 361] said route, locating same through what is now the site of the city of Shawnee. Pursuant to said change the company filed another map with the Secretary of the Interior showing said change, which map the Secretary of the Interior declined to approve. Relating thereto, the court said:

"No conditions precedent to the right to build the road are to be found in the Act of 1888 and those which follow it, except such as provided for the protection of the Indians, or granted authority to the railroad company. The railroad company, then, accepted the grant upon the conditions therein provided, and no other. It had the right to rely upon the grant of powers made to it, upon conditions only that it should fulfill and comply with the precedent conditions upon which the powers were granted.

"The company, having accepted the condition upon which it was provided that it might build its line in the Indian Territory, and having entered upon its location and construction, had a right to locate and construct its line without the imposition of further conditions. Congress itself would have no right to impose them, unless it should undertake to do so under the power, reserved in the act itself, 'To amend, add to, alter, or repeal this act,' a reservation of authority which does not exist in the Secretary of the Interior. * * *

"We, therefore, hold that the Choctaw, Oklahoma & Gulf Railway Company was authorized by the Acts of 1888 and 1894, to locate its own lines through the section of country wherein 'section 4' is built, and has located this line by the most feasible and practicable route, and inasmuch as the right of location and construction were dependent only upon the performance of the conditions set forth in the act, and that these conditions were for the protection of the Indian Tribes and nations or of Indian occupants under the laws, cutsoms and usages of the Indian tribe or nation, and that the defendant company has fully complied with the conditions, that the defendant company [fol. 362] is invested and empowered with the right to locate and construct its line, and to the approval of the Secretary of the Interior therefor, and that, the Indian interests having been extinguished, the land became subject to the laws of the territory of Oklahoma, without the intervention of the

limitations of the Indian Intercourse Act. And that the defendant company, having complied with the provisions of the laws of this territory authorizing the laying out and construction of railways, is entitled to locate and construct its lines thereunder. * * *"

We are convinced that the viewpoint of the territorial Supreme Court as to the requirements of the filing of said map is correct. Clearly it was not the intention of Congress that the making of a survey, or the filing of maps thereof, through the vast unsettled public domain should operate as an irrevocable or final location of the route of said railroad. A definite location may be fixed by construction of the road. Jamestown & Northern Ry. Co. v. Jones, 177 U. S. 125, 44 L. Ed. 698; Stuart v. Union Pac. R. R. Co., 227 U. S. 342, 33 S. Ct. 338, 57 L. Ed. 535. The duty was enjoined on the company to construct its road along the "most feasible and practicable route". Serious difficulties were confronted on every hand; homeseeking immigrants ignored the staked and guarded right of way claimed in a diagonal direction through the land sought to be settled by them as a town site; bitter controversy ensued and in the newly organized tribunals the assertion of the rights of the company by litigation, by delay alone, would cause the forfeiture of the franchise conferred upon it and of the grant made to it by Congress to carry out its farsighted policy of furnishing a means of transporta-[fol. 363] tion to those who had cast their fortunes in the newly opened and unsettled domain. At the time of the passage of the Act of 1888, and prior to April 22, 1889, every person, except those specifically recognized by the government, no matter how long his occupation or how large his improvements, was a trespasser and could maintain no right of possesssion against the United States or its grantees. And the company having been granted an estate in præsenti, of which all persons were bound to take notice, these numerous settlers, by adverse claims of occupancy, could not hinder, frustrate, and effectively thwart the declared policy of the government in granting a free right of way to a company to whom it had delegated the privilege, and which had accepted the duty, of constructing and operating a railroad through the public domain.

The right of the railroad company to said right of way was not predicated upon a condition precedent that a map

should be filed showing the exact location of said railroad, nor was there a condition subsequent attached to said grant that in the event a map not filed and approved, the grant of right of way should become forfeited or void. The attendant benefit was specifically stated in the act that "after the filing of said maps no claim for a subsequent settlement and improvement upon the right of way shown by said map shall be valid as against the said company," referring, of course, to the "individual occupants according to the laws, customs, and usages of any of the Indian nations or tribes." Unless the company commenced [fol. 364] grading said located land within six months after the filing of the map, the act provides that "such location shall be void." and provision is made that the Secretary of the Interior shall approve the said location in sections of 25 miles before construction shall begin on such sections.

We must conclude that without the filing of a map prior to the actual construction of the railroad the company had a right to change its location to conform to "the most feasible and practicable route," and that by the filing of the map before construction of the railroad the company was not irrevocably precluded from selecting another route which it determined to be more feasible and practicable under the conditions confronting it. Stuart v. Union Pacific R. R. Co., 227 U. S. 342, 33 S. Ct. 338, 57 L. Ed. 535; Nielsen v. Northern Pac. R. R. Co. (C. C. A.), 184 Fed. 601; Nadeau v. Union Pac. R. R. Co., supra.

On April 24, 1896, a congressional act (29 Stat. 98) was passed relating to the railroad line with which we are dealing, which in part provides:

"Section 3. That the line of railroad which has been heretofore constructed shall be regarded and treated as a full compliance by said company with the requirements of the act applicable to it, by which it was required as a condition of further construction thereafter to complete its main line prior to February 18, 1896, and said company may exercise from time to time the rights, powers, and franchise heretofore or by this act conferred as to further extensions of or branches from its existing line."

The above constitutes a congressional approval of the location of the road on the route which was finally selected. [fol. 365] We therefore conclude that the right of way was

definitely located by construction of the railroad line, and the grant thereof related back to the date of the act, and since the rights of plaintiffs' predecessors in title were acquired with notice of the rights of the railroad company previously granted, subject to the definite location of the right of way, they had no title to the land itself to convey at the time the right-of-way deeds were executed by them to the company. By the deeds they simply waived their claim of possession.

Plaintiffs contend, however, that by the acceptance of the deeds hereinabove mentioned, the railroad company, and its successors in interest, the city, are estopped from denying the title of plaintiffs' predecessors to the tracts of land in controversy. This claim of plaintiffs overlooks, however, that the title of the railroad company was extinguished by abandonment and that the right of reverter inured to the benefit of the United States and that by Act of Congress dated March 8, 1922 (42 Stats. 414), the United States invested in the city the title to said property by specific grant for certain purposes as set forth in said act. There can be no estoppel as against the United States arising by reason of the individual acts or contracts of individuals. The title of the city is deraigned from the government and not from the railroad company, nor from the predecessors of plaintiffs.

The reversion clause in the Noble deed purported to contract with reference to a right retained by the United States [fol. 366] government, and was therefore wholly ineffective. We point out also that in the Higgins deed the deed expressly recognized the rights of the company under the Act of 1888, and subsequent acts, which right we have determined hereinabove to be superior to the claims of the Higgins heirs. We conclude that upon abandonment by the railroad company, and the judicial determination thereof, as hereinabove set forth, the city became invested with the title to the tracts of land in controversy subject to the provisions of Congress by the Act of March 8, 1922 (42 Stats. 414).

McNeill, C.J., and Riley, Bayless, Busby, Welch, Corn, and Gibson, JJ., concur. Phelps, J., not participating.

[fols. 367-377] Petition for rehearing, covering 10 pages, filed March 5, 1935, omitted from this print. It was denied, and nothing more, by order of May 7, 1935.

[fol. 378] IN SUPREME COURT OF OKLAHOMA

ORDER DENYING PETITION FOR REHEARING—May 7, 1935

23,821—Geo. Noble et al. v. City of Oklahoma City. Petition for rehearing denied. Phelps, J., not participating.

23,822—Robert W. Higgins v. City of Oklahoma City. Petition for rehearing denied. Phelps, J., not participating.

Edwin R. McNeill, Chief Justice.

[File endorsement omitted]

[fol. 379] IN SUPREME COURT OF OKLAHOMA

ORDER STAYING MANDATE—Filed May 9, 1935

On this 9th day of May, 1935, upon the application of the plaintiffs in error in the above entitled cause, it is ordered that the issuance of the mandate of this court to the trial court in said cause be, and it is hereby, stayed pending the application of said plaintiffs in error to the Supreme Court of the United States for a writ of certiorari to this court in said cause, and upon the receipt of notice by the clerk of this court from the clerk of the Supreme Court of the United States that said application for writ of certiorari has been duly filed in the Supreme Court of the United States before August 7, 1935, the issuance of said mandate shall be further stayed until the final decision and judgment of the Supreme Court of the United States in such certiorari proceedings.

Edwin R. McNeill, Chief Justice.

[fols. 380 & 381] [Title omitted]

ORDER STAYING MANDATE—Filed May 9, 1935

On this 9th day of May, 1935, upon the application of the plaintiffs in error in the above entitled cause, it is ordered that the issuance of the mandate of this court to the trial court in said cause be, and it is hereby, stayed pending the application of said plaintiffs in error to the Supreme Court of the United States for a writ of certiorari to this court in said cause, and upon the receipt of notice by the clerk of this court from the clerk of the Supreme Court of the United States that said application for writ of certiorari has been duly filed in the Supreme Court of the United States before August 7, 1935, the issuance of

said mandate shall be further stayed until the final decision and judgment of the Supreme Court of the United States in such certiorari proceedings.

Edwin R. McNeill, Chief Justice.

[fol. 382] In the Supreme Court of the United States,
October Term, 1935

No. —

George Noble and William Noble, Petitioners,

vs.

The City of Oklahoma City, a Municipal Corporation, Respondent

Consolidated

No. —

Robert W. Higgins, Jr., John T. Higgins, Raleigh E. Higgins, Burford C. Higgins, Estella Jones nee Higgins, Cass W. Higgins, an Insane Person, by Jack Jones, his Next Friend and Duly Appointed, Qualified and Acting Legal Guardian, Eva H. McMillan, Fairy Adkins, Gertrude Koelsch nee Higgins, and Nellie Shannon nee Higgins, Petitioners,

vs.

The City of Oklahoma City, a Municipal Corporation, Respondent

Stipulation as to Printing Record

It is hereby stipulated and agreed between counsel for petitioners and counsel for respondent that the above entitled cases, having been consolidated for hearing and decided in one opinion by the Supreme Court of the State of Oklahoma below, may be consolidated for the printing of the record and briefing and submission in the Supreme Court of the United States.

[fol. 383] It is further stipulated by counsel that the following parts of the record in each case, the record not having been printed heretofore in either case, but having been certified and transmitted in typewritten form in each case by the clerk of the Supreme Court of the State of Oklahoma to the Clerk of this Court, are hereby designated as the parts of the record in each case, and the only parts thereof, necessary to

be printed for the presentation of said cases in this Court, towit:

The Petition;
The Answer and Crosspetition;
The Reply and Answer;
The Statement of the Evidence;
The Motion for New Trial;
The Decision and Judgment of the Trial Court, with Order Over-ruling Motion for New Trial, Notice of Appeal, etc.,
The Petition in Error in the Supreme Court of Oklahoma;
The Motion to Consolidate the Causes and Order Consolidating them;
The Opinion and Decision of the Supreme Court of Oklahoma;
The Petition of Plaintiffs in Error for Rehearing;
The Order of the Supreme Court of Oklahoma Denying Petition for Rehearing; and
The Order of the Supreme Court of Oklahoma Staying the Mandate.

It is further stipulated by counsel that a copy of transcript of the parts of the record above designated in each case has been prepared by them and is attached as Exhibit A to this [fol. 384] stipulation, and that it contains and comprises all the parts of the record in each case necessary to be printed, and that the printing thereof shall be a full compliance with this stipulation.

It is further stipulated by counsel that the foregoing parts of the record in each case may be printed together as a consolidated record for both cases and shall be printed without duplication; and the Clerk of the Supreme Court of the United States is authorized and requested to arrange and print said designated parts of the record in each case as a consolidated record so as to avoid duplication in printing, making such omissions as may be necessary for that purpose, and also to omit any matter therein such as the repetition of the title of the court and case, signatures, etc., which he may deem unessential.

Warren E. Libby, Henry L. Goddard, Suits & Disney, Fred Ptak and Charles H. Garnett, Attorneys for Petitioners. Harlan Deupree, Municipal Counselor; J. H. Jarman, W. H. Brown, Attorneys for Respondent.

[fol. 385] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1935

No. 335

ORDER ALLOWING CERTIORARI—Filed October 14, 1935

The petition herein for a writ of certiorari to the Supreme Court of the State of Oklahoma is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[fol. 386] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1935

No. 336

ORDER ALLOWING CERTIORARI—Filed October 14, 1935

The petition herein for a writ of certiorari to the Supreme Court of the State of Oklahoma is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

FILE COPY

FILED
AUG 5 19
CHARLES ELMORE CR

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935

No. 335

GEORGE NOBLE AND WILLIAM NOBLE,
Petitioners,

v.

THE CITY OF OKLAHOMA CITY, A MUNICIPAL CORPORATION.

No. 336

ROBERT W. HIGGINS, JR., JOHN T. HIGGINS, RALEIGH E. HIGGINS, ET. AL.,
Petitioners,

v.

THE CITY OF OKLAHOMA CITY, A MUNICIPAL CORPORATION.

PETITION FOR WRITS OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OKLAHOMA AND BRIEF IN SUPPORT THEREOF.

HENRY L. GODDARD,
WARREN E. LIBBY,
R. L. DISNEY,
FRED E. SUITS,
FRED PTAK,
CHAS. H. GARNETT,
Counsel for Petitioners.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935

No. 335

GEORGE NOBLE AND WILLIAM NOBLE,

Petitioners,

v.

THE CITY OF OKLAHOMA CITY, A MUNICIPAL CORPORATION.

No. 336

ROBERT W. HIGGINS, JR., JOHN T. HIGGINS, RALEIGH E. HIGGINS, BURFORD C. HIGGINS, ESTELLA JONES NEE HIGGINS, CASS W. HIGGINS, AN INSANE PERSON, BY JACK JONES, HIS NEXT FRIEND AND DULY APPOINTED, QUALIFIED AND ACTING LEGAL GUARDIAN, EVA H. McMILLAN, FAIRY ADKINS, GERTRUDE KOELSCH NEE HIGGINS, AND NELLIE SHANNON NEE HIGGINS,

Petitioners,

v.

THE CITY OF OKLAHOMA CITY, A MUNICIPAL CORPORATION.

PETITION FOR WRITS OF CERTIORARI.

MAY IT PLEASE THE COURT:

The petitioners George Noble and William Noble above named, and the petitioners Robert W. Higgins, Jr., John

T. Higgins, Raleigh E. Higgins, Burford C. Higgins, Estella Jones *nee* Higgins, Cass W. Higgins, an Insane Person, by Jack Jones, his Next Friend and Duly Appointed, Qualified and Acting Legal Guardian, Eva H. McMillan, Fairy Adkins, Gertrude Koelsch *nee* Higgins, and Nellie Shannon *nee* Higgins above named, respectfully petition this Honorable Court for writs of certiorari in the above entitled causes to the Supreme Court of the State of Oklahoma, and respectfully show to this Honorable Court as follows:

A.

Summary Statement of the Matter Involved.

For convenience these cases will be referred to as the *Noble* case and the *Higgins* case, respectively. They were brought by the petitioners, as plaintiffs, in the District Court of Oklahoma County, in the State of Oklahoma, against the respondent, as defendant. Judgment was rendered in that court in each case for defendant. The petitioners appealed to the Supreme Court of the State of Oklahoma and appear in that court as plaintiffs in error against the respondent as defendant in error. That court consolidated the cases and affirmed the judgment of the trial court in a decision handed down February 19, 1935, which became final upon denial of petition for rehearing on May 7, 1935 (R. 222).

The subject matter of the litigation is certain real estate situated in Oklahoma City, in the County and State of Oklahoma. That involved in the *Noble* case is the north 40 feet of lot 6 in block 36 of the original townsite, and that in the *Higgins* case is a strip 100 feet wide and approximately 1325 feet long through the southwest quarter of Section 33, Township 12 North, Range 3 West of the Indian Meridian, and both are abandoned right of way of the Choctaw Coal and Railway Company and its successors in title. The

petitioners, as plaintiffs, alleged a cause of action in the trial court for ejectment of the defendant from this real estate and the quieting of title thereto in them (R. 1 and 146).

The land involved was originally a part of the tribal lands of the Creek Indians. By a series of treaties beginning with the Treaty of Washington, on January 24, 1826, 7 Stat. 286, and including the Treaty of Washington, on March 24, 1932, 7 Stat. 366, the Treaty of Fort Gibson, on February 14, 1833, 7 Stat. 417, and the Treaty of Washington, on August 7, 1856, 11 Stat. 699, the Creek Indians were removed from their lands east of the Mississippi, which were ceded to the United States, to lands ceded to them by the United States in the Indian Territory, now the State of Oklahoma, and the fee title to which was conveyed to them by said treaties and the Acts of Congress approving them, and by a patent issued pursuant thereto by Millard Fillmore, President of the United States, on August 11, 1852, and recorded in Volume 4 of Indian Deeds in the Office of Indian Affairs, pages 446 and 447 (R. 136).

By similar treaties and conveyances the Choctaws and Chickasaws were given a fee title to their lands in the Indian Territory, now the State of Oklahoma.

By the Treaty of Washington, on June 14, 1866, 14 Stat. 785, the Creeks for a consideration of $975,168.00, ceded to the United States the western half of their entire domain in trust to be sold and used as homes for such other civilized Indians as the United States might choose to settle thereon. The line between the eastern half and the western half of their lands was defined and located. It is now the line between Lincoln County and Creek County in the State of Oklahoma.

By Act of March 30, 1885, 23 Stat. 362, Congress authorized the President to open negotiations with the Creeks and other Indians for the opening to settlement under the home-

stead laws of certain of their lands in the Indian Territory. Under this authority a treaty was negotiated with the Creeks at Washington, on January 19, 1889, 25 Stat. 757, by which they for a consideration of $2,280,857.10 ceded and granted to the United States full and complete title, without reservation or condition, to the entire western half of their lands, which they had previously ceded to the United States in trust, to be "entirely freed from any limitation in respect to the use and enjoyment thereof," and surrendered and extinguished all their claims of whatsoever nature thereto. By Article IV it was provided that:

> "These articles of cession and agreement shall be of no force or obligation upon either party until they shall be ratified and confirmed, first, by Act of the National Council of said Muscogee (or Creek) Nation, and secondly, by the Congress of the United States." (R. 59.)

This Treaty was ratified and confirmed by the National Council of the Creek Nation on January 31, 1889, and by Congress on March 1, 1889, 25 Stat. 757. The Act of Congress ratifying and confirming it further provided:

> "That the lands acquired by the United States under said agreement shall be a part of the public domain."

By the Indian Department Appropriation Act, approved March 2, 1889, 25 Stat. 1003, Congress made an appropriation for the purchase from the Seminole Nation of a part of their lands and authorized the President to negotiate such purchase, and further provided that upon the purchase thereof such land should become part of the public domain and should be disposed of to actual settlers under the homestead laws only, but that no person should be permitted to enter thereon until the same were opened for settlement by proclamation of the President, and further that the foregoing provisions should apply to and regulate

the disposal of the lands acquired from the Creek Indians by the Treaty of January 19, 1889, which became effective on approval by Congress on March 1, 1889.

On March 23, 1889, the President issued his proclamation opening a portion therein described of the lands acquired from the Creek Nation and the Seminole Nation to settlement under the homestead laws at the hour of 12:00 o'clock noon, on April 22, 1889.

The land where the city of Oklahoma City is now located was included in the western half of the lands of the Creek Nation acquired by the United States and opened for settlement under the President's proclamation.

On February 18, 1888, Congress passed an Act authorizing the Choctaw Coal & Railway Company to build a line of railroad from a point on Red River, at the bluff known as Rocky Cliff in the Indian Territory (south of what is now Ardmore, Oklahoma) and running thence by the most feasible and practicable route through said Indian Territory to a point on the boundary line between Indian Territory and Arkansas opposite Polk or Sevier Counties in that State, 25 Stat. 39. On February 13, 1889, Congress passed an Act amending the first section of the Act of February 18, 1888, by authorizing the Choctaw Coal and Railway Company to build a branch line of railway from some suitable point on the main line westerly and northwesterly to the company's coal veins in Tobucksey County in the Choctaw Nation (near what is now Hartshorne or Haileyville, Oklahoma (R. 124-125), thence by the most feasible and practicable route to an intersection with the Atchison, Topeka & Santa Fe Railway, hereinafter referred to as the Santa Fe, at a point between Halifax Station and Ear Creek (near what is now Goodwin, Oklahoma (R. 124-125). 25 Stat. 668.

The original Act invested and empowered the railway company with the right of locating a railway through the

Indian country between the terminal named, and with the right to construct, use and maintain its tracks upon the right of way therein provided for, and with the right to take and use, for purposes of a railway and for no other purpose, a right of way 100 feet wide through the Indian Territory, and further provided that whenever any part of the lands so authorized to be taken should cease to be used for railway purposes, the same should revert to the Nation or Tribe of Indians from which it was taken. It also provided for the payment of compensation for all property of individuals taken or damaged in the construction of the road, and for the payment of $50.00 a mile to the Indian Tribe whose land was taken for a right of way, with proviso that in event of the dissent of any Tribe to such allowance, the determination of a just compensation should be by appraisement of three disinterested referees from whose award either party might appeal by original petition either to the District Court at Fort Smith, Arkansas, or to the District Court for the Northern District of Texas, which courts should have jurisdiction to hear and determine the subject matter of such petition, according to the laws of the state in which heard for determining damages for property taken for railroad purposes. The Amendment was of the first section only and merely conferred authority to construct a branch to the main line between certain termini named. None of the provisions of the original Act for acquiring title to a right of way were changed by the Amendment. Both the original Act and the Amendment are set out in full in the printed record in these cases at pages 26 to 33.

Prior to April 22, 1889, a date commonly referred to as the "Opening," the above company, herein referred to as the Choctaw Railway Company, had surveyed and marked a line of its proposed railroad from the north and south tracks of the Santa Fe Railway through what is now Okla-

homa City, in a northwesterly direction across the southeast quarter of Section 33 in Township 12 North of Range 3 West of the Indian Meridian. It was a matter of common knowledge at the time that a townsite would be laid out on this quarter section.

Prior to the Opening a plat of such townsite had been made on paper and at 12:00 o'clock noon on April 22, 1889, a surveyor's gang stepped off the Santa Fe right of way and began to run lines and drive stakes to mark the lots and blocks of the townsite. Several thousand persons arrived on this townsite and staked and occupied lots that day. As the survey proceeded they adjusted their lot claims and boundaries to the surveyed lines. When the townsite surveyors reached the right of way which the Choctaw Railway Company had surveyed, they and the lot claimants wholly disregarded such claimed right of way, but surveyed and staked lots across it as though it were not there. All of the lots in the original townsite, comprising the southeast quarter of said Section 33, were occupied the day of the Opening (R. 118, 132, 134). On that day the ancestor of the petitioners in the *Noble* case staked and occupied lot 6 in block 36, in the townsite of Oklahoma City, the north 40 feet of which is involved in this litigation. On the same day Robert W. Higgins settled upon the southwest quarter of said Section 33, and undertook to file a homestead entry upon it. But his right to file was contested and was not finally permitted until after a decision in his favor by the Secretary of the Interior on June 29, 1894. *Higgins* v. *Adams,* Volume 18, page 598, of Decisions of the Department of the Interior Relating to Public Lands. The lots in the townsite were improved with dwellings and business buildings as promptly as these could be erected. The City had about 5,000 population from the Opening (R. 127). All the lots had substantial

value on that day and this increased with the passing of time and the erection of improvements.

On July 13, 1889, the Choctaw Railway Company filed with the Secretary of the Interior a map of definite location of its line of road extending from the Santa Fe tracks at Oklahoma City westerly to Fort Reno in Canadian County (Exhibit 12, R. 90A).

For more than a year after the opening there was no provision of law operative in Oklahoma Territory for the entry of public lands for a townsite. In a few days after the opening some of the citizens gathered together and discussed the matter of a government, and the general opinion was that some form of government should be established and upheld. So a regular election was called by a committee of citizens and was duly held and city officials, consisting of mayor, recorder, city attorney, etc., were elected. This was a purely voluntary municipal organization without any authority of law, but it was acquiesced in by the people. Ordinances were adopted. A plat of the townsite was filed in the office of the city recorder and provision was made for recording transfers of platted property. The city recorder issued certificates to the occupants of lots on the townsite and transfers of lot rights were made by quit claim deeds and lot certificates which were filed for record in the city recorder's office (R. 132-133).

On May 14, 1890, Congress passed the Oklahoma Townsite Act, 26 Stat. 109. Pursuant to its provisions boards of townsite trustees were appointed and entry of the southeast quarter of said Section 33 as a townsite was promptly made and patent was issued in due course conveying the same to Townsite Board No. 2 as trustees in trust for the lot occupants thereof. The patent purported to convey the entire quarter section, without exception, limitation or reservation, for a townsite (R. 6). As speedily as the

trustees could determine who was entitled to the various lots, they issued their trustees deed conveying them accordingly. They adopted the survey and plat of the City of Oklahoma City as made on April 22, 1889, as the townsite plat.

Meanwhile, beginning in 1889 and extending into 1891, a strenuous controversy was waged between the Choctaw Railway Company on the one hand and the lot claimants on the other, over the question of whether the Company had priority for its right of way through the city over the rights of the lot claimants. The Company contended that the Acts of Congress above mentioned were a grant to it *in praesenti* of title to such right of way, and the lot claimants denied this and contended that because of their occupation of the lots before the filing by the Company of its map of location, their rights thereto, being prior in time, were superior. The fact, and much of the details, of this controversy is shown by the testimony of all the witnesses, Cornelius (R. 95), Owen (R. 112), Ebey (R. 132), and Scott (R. 134), and also by the Committee Report of the House of Representatives on the bill to authorize the issuance of bonds by Oklahoma City to acquire a right of way for the Company (R. 125).

It was finally settled by an agreement by which the Company abandoned its claim to a right of way under the Act of Congress and agreed to change its line from that shown on its map of location and take a course through the City parallel to the streets and alleys as surveyed and laid out and take a right of way only 100 feet wide, instead of 300 feet wide which it had originally claimed for right of way and station grounds. On its part the City and its Citizens Committee agreed to obtain such new right of way and procure the conveyance of the title thereto from the lot owners without cost to the Company. (See testimony of witnesses and Committee Report above mentioned).

This agreement was carried out and a new right of way was located so as to include the 20 feet of alley between First and Second Streets and 40 feet off the south end of lots fronting north on Second Street, and 40 feet off the north end of lots fronting south on First Street (Exhibit 13, R. 90B). Deeds were obtained from the lot owners, of whom the ancestor of petitioners Noble was one, conveying the necessary land to the Company for railway and right of way purposes, with the following clause expressly providing for reversion of the land conveyed to the grantors in event it ceased to be used for railroad purposes, to wit:

> "Being intended for the use and occupation of said party [grantee], its successors and assigns, as and for its right of way for the constructing, operation and maintenance of its railroad and business at or upon the land hereby released and quit-claimed: Provided, that in case of abandonment of said premises by said second party, its successors or assigns, for the purposes above mentioned, the same shall revert to the grantors, their heirs or assigns." (R. 10.)

Some of the lot owners would not sell their land necessary for the right of way at a price the Citizens Committee would pay and so resort was had to condemnation proceedings in the name of the Railway Company against them early in 1891. But the ancestor of petitioners Noble was not one of these, and ultimately all of them, upon receiving the condemnation money, executed right of way deeds similar to the Noble deed.

The right of Robert W. Higgins to make homestead entry on the southwest quarter of said section 33 being involved in a land office contest until June 29, 1894, the patent to him therefor was not issued until September 19, 1896 (R. 151). The Company meanwhile had constructed its road across this quarter section and had had its trains in operation over it since 1892. But on March 24, 1898, it obtained from

Robert W. Higgins and wife, for a consideration of $400.00, a conveyance termed a right of way deed and release of damages, which conveyed a strip of land 100 feet wide across said southwest quarter, part of which is the land here involved in the *Higgins* case, "for a right of way for its railroad, telegraph, and telephone lines, and for railroad or station purposes," with the habendum clause thereof in the following language:

> "To have and to hold the same by the said Choctaw, Oklahoma and Gulf Railroad Company, together with all and singular the rights, privileges and appurtenances thereunto belonging and all the rights and privileges which said company is authorized to have, hold and exercise under and by virtue of the Act of Congress granting the Choctaw Coal and Railway Company a right of way through the Indian Territory, approved February 18, 1888, and subsequent Acts of Congress amending and extending said Act together with all the rights and privileges granted unto said Choctaw, Oklahoma and Gulf Railroad Company by an Act of Congress approved August 24, 1894, and the Act of Congress approved April 24, 1896, and unto its successors, and assigns forever." (R. 153.)

Beginning late in 1891 the Company constructed its line of road through Oklahoma City on the right of way obtained for it by the City and Citizens Committee of Oklahoma City in settlement of its controversy with the lot claimants and conveyed to it by right of way deeds such as the Noble deed. The road thus constructed was operated by the Choctaw Coal & Railway Company and its successor, the Choctaw, Oklahoma & Gulf Railroad Company down to December 4, 1930. On November 17, 1927, the two companies last named, together with the St. Louis-San Francisco Railway Company, entered into a contract (R. 123) with the City of Oklahoma City, respondent here, whereby for a consideration of $4,000,000.00 they agreed to sell and convey such

title as they had to their rights of way across the land here involved and other land and remove therefrom their tracks which cut through the heart of the business district of the City and had become a serious public inconvenience. Thereafter the said successors to the Choctaw Coal and Railway Company applied to the Interstate Commerce Commission for a certificate of necessity and convenience permitting them to abandon the portion of their right of way which they had contracted to sell, including that here involved, and obtained such certificate in due course (R. 11), and then executed their quit claim deed to the City for such abandoned portion of their right of way and were paid the agreed consideration therefor (R. 49 and 177).

On December 4, 1930, they abandoned this right of way, removed their rails, ties and all railway property therefrom, and delivered possession to the City (R. 50). On the next day, December 5, 1930, in an action brought by the City against the railroad companies in the United States District Court for the Western District of Oklahoma, it was determined and adjudged and a decree was entered (R. 37) that the land in question had been abandoned for railroad purposes, and that the railroad companies' title thereto had passed to the City under the Act of Congress of March 8, 1922, 42 Stat. 414 (R. 87).

It was conceded in the trial court in the instant cases, and also in the Supreme Court of Oklahoma, that upon abandonment of this right of way by the railroad company its title terminated and the land reverted either to the United States or to petitioners through their predecessors in title. In its decision the Supreme Court said on this point:

> "It is conceded that upon abandonment by the railroad company its title terminated. We must determine, however, whether or not the reverter inured to the United States or passed by the government patent issued to plaintiff's predecessors." (R. 210.)

The City took possession of the land here involved on December 4, 1930, and has remained in possession continuously since. These cases were filed in December, 1930, and January, 1931. The City admits that it is not using, and does not intend to use, this land for railroad purposes, but will devote it to the purpose of a public park (R. 16-17).

The respondent's claim is that under the Act of February 18, 1888, as amended by the Act of February 13, 1889, the Choctaw Coal and Railway Company became vested with title *in praesenti* to the right of way as thereafter located and obtained and upon which its road was constructed through the City of Oklahoma City, and that upon its abandonment of such right of way, the title thereto reverted to the United States under said Acts of Congress, and that by virtue of the Act of Congress of March 8, 1922, 42 Stat. 414, the reversionary right and title that passed to the United States was granted to the City, and that it, therefore, became owner of the land within the boundaries of such right of way upon its abandonment.

The petitioners claim that the Act of February 18, 1888, and the Amendment thereto of February 13, 1889, was not a grant *in praesenti* of a right of way, but was merely a grant of the right to acquire a right of way by purchase or condemnation through Indian country only, the title thereto not to vest until taken and paid for as in the Act prescribed, and that the Act itself had no application outside of the Indian country or in the public domain, and that the land here involved was Creek Indian land at the time of the enactment of the Amendment of February 13, 1889, and that the only title to its right of way that the Company acquired was that conveyed by the deeds of the petitioners' ancestors under both of which the title to the right of way on the abandonment of it for railroad purposes would revert to the grantors, their heirs or assigns.

The petitioners also claim that even if the Act of February 18, 1888, with the Amendment thereto, granted a right of way *in praesenti* to the Choctaw Railway Company, still by the express language of the Act there was a right of reverter in the Creek Tribe of Indians, which passed by treaty and cession to the United States, in event such right of way ceased to be used for railroad purposes, and that this right of reverter in the United States passed by its patent to the patentee and by deed and inheritance to the petitioners in each case, so that upon the extinguishment of the railroad title by abandonment for railroad use, the full title reverted to them. They also claim that the Railroad Company was estopped by virtue of the right of way deed with express reversion clause therein to deny or dispute the title of its grantors, or to deny that it abandoned its claim to a right of way under the Act of Congress and took title to its right of way under the deed from the land owners, or to assert a title derived from any other source. They also claim that the Act of March 8, 1922, does not apply to the facts of these cases, for that there never was any patent by virtue of which, in the language of that Act, title could pass to the City.

The trial court upheld the contention of the City, defendant below and respondent here, and denied the contentions of the plaintiffs below and petitioners here (R. 139 and 186). On appeal the Supreme Court of Oklahoma affirmed the judgments of the trial court (R. 195).

B.

Reasons Relied on for the Allowance of the Writs.

As grounds for allowance of the writs hereinafter prayed for the petitioners say:

I.

That the decision of the Supreme Court of Oklahoma below, being the highest court of said State in which a decision could be had in these cases, decides a Federal question of substance in its construction and application of the Act of Congress of February 18, 1888, 25 Stat. 39, and the Amendment thereto of February 13, 1889, 25 Stat. 668, to the facts of these cases in a way not in accord with the applicable decision of this Court in *Cherokee Nation* v. *Southern Kansas Railway Co.*, 135 U. S. 641, and in conflict with the applicable decisions of inferior Federal courts in *Cherokee Nation* v. *Southern Kansas Railway Co.* (D. C. West. Dist. Ark.) 33 Fed. 900, and *United States* v. *Fort Smith & Western Railway Co.* (8th C. C. A.) 195 Fed. 211, for that the said Supreme Court of the State of Oklahoma held that said Acts of Congress granted a right of way vesting *in præsenti* to the Choctaw Coal & Railway Company through the Indian Country between the termini named in said Acts, notwithstanding the decision of this Court in the case cited, and of the inferior Federal courts in the cases cited, held that other Acts of Congress, in precisely the same language and under precisely the same fact situation as those, did not grant title to a railroad right of way *in præsenti*, but granted merely a franchise to construct a railway through the Indian Territory and authorized and empowered the railway company named therein to condemn, pay for and acquire a right of way therefor under the power of eminent domain.

II.

That in the alternative, if the decision of the Supreme Court of Oklahoma below should not be deemed to be not in accord with the applicable decision of this Court and those of inferior Federal courts as set forth in paragraph

I, *supra,* then said State court, in its construction and application of said Acts of Congress to the facts of these cases, has decided a Federal question of substance which has not heretofore been, but should be now, determined by this Court, for that the construction and interpretation of said Acts of Congress by said State court is contrary to the natural, reasonable and ordinary meaning of the language used therein, and to the intention and purpose of Congress as shown in the debate upon their enactment, and to the settled executive and administrative interpretation of them through a long period of years.

III.

That the decision of the Supreme Court of Oklahoma below, being the highest court in said State in which a decision in these cases could be had, decided a Federal question of substance in a way not in accord with the applicable decisions of this Court and of inferior Federal courts and of other State courts of last resort, for that said State court, after holding that the Choctaw Coal & Railway Company was granted by Congress a right of way vesting *in præsenti* through the land where Oklahoma City is now located prior to said land becoming part of the public domain on March 1, 1889, held further that the patents for such land issued thereafter by the United States, though purporting to convey the whole of the tracts therein described, did not pass any title to the patentee to the fee or right of reverter underlying the granted right of way and that upon abandonment of said right of way for railroad purposes the land would revert to the United States instead of to the patentee or those claiming under him; and that this holding is not in accord with the decisions of this Court in *St. Joseph & Denver C. R. Co.* v. *Baldwin,* 103 U. S. 426; *Smith* v. *Townsend,* 148 U. S. 490; *Rio Grande Western Ry. Co.* v. *Stringham,* 239 U. S. 44; nor with the

decision of the Eighth Circuit Court of Appeals in *Denver & R. G. R. Co.* v. *Mills,* 222 Fed. 481; nor with the decisions of the Supreme Court of Idaho in *Oregon Short Line* v. *Stalker,* 14 Ida. 362, 94 Pac. 56; *Crandall* v. *Goss,* 30 Ida. 661, 167 Pac. 1025; *Hurst* v. *Idaho-Iowa Lateral Canal Co.,* 34 Ida. 342, 202 Pac. 1068; *Bowman* v. *McGoldrick,* 38 Ida. 30, 219 Pac. 1063.

IV.

That the decision of the Supreme Court of Oklahoma below, being the highest court of said State in which a decision could be had in these cases, has decided a Federal Question of substance which has not heretofore been, but should be now, determined by this Court, for that said State court, after holding that the Choctaw Coal & Railway Company was granted by Congress a right of way vesting *in præsenti* through the land where Oklahoma City is now located prior to said land becoming part of the public domain on March 1, 1889, held further that said Railway Company could not lawfully abandon, and hence did not in law though it did in fact abandon, its claim to such granted right of way, and that its action in actually acquiring a right of way through said City by purchase from owners holding title by patents from the United States, whose deeds to it contained an express reversion clause whereby it contracted and agreed that the land therein conveyed when abandoned for railroad purposes should revert to the grantors, their heirs or assigns, was of no legal consequence because the acts of Congress prohibited its acquiring a right of way in such manner.

V.

That the decision of the Supreme Court of Oklahoma below, being the highest court of said State in which a deci-

sion could be had in these cases, has decided a Federal question of substance which has not heretofore been, but should be now, determined by this Court, in that it construed the Act of Congress of March 8, 1922, 42 Stat. 414, as applied to the facts of these cases as having the effect to defeat the title to the abandoned railroad right of way through Oklahoma City in those claiming under the original patentees from the United States and to transfer and vest such title in the municipality of the City of Oklahoma City.

VI.

That, as may properly be inferred from the fact that there are 166 lots in Oklahoma City all or part of which are in the abandoned railroad right of way referred to in these cases (Exhibit 13, R. 90B), a large number, possibly 100, similar cases are pending or will be brought, and these, if the decision of the Supreme Court of Oklahoma in the instant case becomes final, will be prosecuted in the United States courts, which will not be bound by the decision of the Supreme Court of Oklahoma but will decide the questions anew, and may reach a decision different from the State court, with the result that this Court will have the questions here raised again presented to it in a petition for a writ of certiorari, and therefore, for the practical and legal, if not statutory, reason of settling the matter and putting an end to litigation and avoiding conflict of decision in inferior courts, this Court ought to grant certiorari in these cases.

WHEREFORE, your petitioners respectfully pray that writs of certiorari be issued out of and under the seal of this Honorable Court directed to the Supreme Court of the State of Oklahoma commanding that court to certify and send to this Court for its review and determination on a day certain

to be therein named, a full and complete transcript of the record and all proceedings in the cases numbered and entitled on its docket as No. 23,821, George Noble and William Noble, Plaintiffs in Error, *v.* The City of Oklahoma City, a Municipal Corporation, Defendant in Error, and No. 23,822, entitled Robert W. Higgins, Jr., John T. Higgins, Raleigh E. Higgins, Burford C. Higgins, Estella Jones nee Higgins, Cass W. Higgins, an Insane Person, by Jack Jones, his Next Friend and Duly Appointed, Qualified and Acting Legal Guardian, Eva H. McMillan, Fairy Adkins, Gertrude Koelsch nee Higgins, and Nellie Shannon nee Higgins, Plaintiffs in Error, *v.* The City of Oklahoma City, a Municipal Corporation, Defendant in Error, and that the judgment of the said court in the said cases may be reversed by this Honorable Court and that your petitioners may have such other and further relief in the premises as to this Honorable Court may seem meet and just; and your petitioners will ever pray.

HENRY L. GODDARD,
WARREN E. LIBBY,
R. L. DISNEY,
FRED E. SUITS,
FRED PTAK, and
CHAS. H. GARNETT,
Attorneys for Petitioners.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935

No. 335

GEORGE NOBLE AND WILLIAM NOBLE,

Petitioners,

v.

THE CITY OF OKLAHOMA CITY, A MUNICIPAL CORPORATION.

No. 336

ROBERT W. HIGGINS, JR., JOHN T. HIGGINS, RALEIGH E. HIGGINS, BURFORD C. HIGGINS, ESTELLA JONES NEE HIGGINS, CASS W. HIGGINS, AN INSANE PERSON, BY JACK JONES, HIS NEXT FRIEND AND DULY APPOINTED, QUALIFIED AND ACTING LEGAL GUARDIAN, EVA H. McMILLAN, FAIRY ADKINS, GERTRUDE KOELSCH NEE HIGGINS, AND NELLIE SHANNON NEE HIGGINS,

Petitioners,

v.

THE CITY OF OKLAHOMA CITY, A MUNICIPAL CORPORATION.

BRIEF IN SUPPORT OF PETITION FOR WRITS OF CERTIORARI.

The Opinion of the Court Below.

The opinion of the Supreme Court of the State of Oklahoma in these cases is not yet officially reported, but is reported in 44 Pac. (2d) 135.

Jurisdiction.

I.

The date of the decision to be reviewed is February 19, 1935, which became final upon the denial of petition for rehearing on May 7, 1935.

II.

The specific claim advanced below and relied on here to give this Court jurisdiction is that both in the trial court and in the Supreme Court of Oklahoma, the defendant below and respondent here claimed title to the real estate involved in the litigation under the provisions of the Acts of Congress of February 18, 1888, 25 Stat. 39, and the Amendment thereto of February 13, 1889, 25 Stat. 668, and the Act of Congress of March 8, 1922, 42 Stat. 414.

III.

The jurisdiction of this Court is invoked under the provisions of Section 237 (b) of the Judicial Code, as amended by the Act of February 13, 1925, 43 Stat. 936; Title 28, Section 344, U. S. Code.

IV.

Certiorari has been granted in cases similar to these at probably every term of this Court for the past several years. They recognize and sustain the jurisdiction of the Court. Specific cases are:

State of Minnesota v. *George Blasius*, 290 U. S. 1;

Missouri State Life Ins. Co. v. *Jester Jones*, 290 U. S. 199;

John L. Gilvary v. *Cuyahoga Valley Ry. Co.*, 292 U. S. 57.

Statement of the Case.

A sufficiently full statement of the case has been given under the summary statement in the petition for the writs to which this brief is attached, and for brevity no part thereof is repeated here.

Specification of Errors.

The petitioners say that the Supreme Court of Oklahoma erred in the following particulars in its decision in these cases:

I.

In holding that the Act of Congress of February 18, 1888, 25 Stat. 39, termed the Choctaw Railway Act, and the amendment thereto of February 13, 1889, 25 Stat. 668, granted and conveyed to the Choctaw Coal and Railway Company title to a right of way between the termini named therein vesting and effective *in præsenti* upon the enactment of the act, the error of which holding is established:

(a) By the language of the Act itself, for that its language does not purport to grant any title vesting *in præsenti* to a right of way, but does purport only to grant a franchise to the Railway Company to construct a railroad through the Indian Country between the termini named, and to acquire such right of way by purchase or condemnation and to exercise the power of eminent domain to condemn, pay for and take such right of way for the price and upon the terms and conditions stated in the Act.

(b) By the fact that the land across which the railroad was to be located under the provisions of the original Act as enacted in 1888 was owned in fee simple by the Choctaw and Chickasaw Indian Nations and remained their tribal property until its allotment in severalty by the Dawes Com-

mission some fifteen years thereafter, and the fact that by the Amendment of February 13, 1889, the only change made in the original Act was to authorize the construction of a branch line of road between certain termini named, the location of which would cause such branch to be constructed across land owned in fee simple by the Creek Nation of Indians, and that Congress was without constitutional authority to appropriate or grant the property of any of these Indian Nations for a public use without or in advance of compensation to them to be fixed with their consent, or to be ascertained by condemnation proceedings, if they did not agree on the compensation.

(c) By Congressional and Departmental construction of the Act, for that the debates in Congress at the time of the enactment of the original Act show that it was understood and intended not to be a grant of a railroad right of way, but only the grant of a franchise to construct a railroad through the Indian Country and to acquire a right of way therefor by purchase or condemnation and the payment of full compensation, and for that later Acts of Congress relating to the Choctaw Railway Company acquiring other rights of way, viz, Act of August 24, 1894, 28 Stat. 502; Act of April 24, 1896, 29 Stat. 98; and Act of March 28, 1900, 31 Stat. 52, distinctly show that no grant of a right of way vesting *in præsenti* was made or intended to be made in said Choctaw Railway Act, and for that the executive branch of the Government in the administration of the Act, both in the message of President Benjamin Harrison vetoing the Oklahoma City bond bill (R. 130) and in the Attorney General's opinion by Assistant Attorney General Willis Van Devanter rendered at the instance of the Land Office (27 L. O. Dec. 414), ruled that it was not a grant of title to a right of way vesting *in præsenti.*

(d) By decisions of the courts of the United States which are conclusive and controlling on the subject, for that the court overlooked or disregarded the decision of the District Court of the United States for the Western District of Arkansas in *Cherokee Nation* v. *Southern Kansas Railway*, 33 Fed. 900, and considered the decision of the Supreme Court of the United States in *Cherokee Nation* v. *Southern Kansas Railway*, 135 U. S. 641, only to the extent of making the erroneous statement that it was not in point, notwithstanding it is precisely in point and controlling upon all state courts, and for that the court overlooked or disregarded the decision of the Eighth Circuit Court of Appeals in *United States* v. *Ft. Smith & Western Railway Co.*, 195 Fed. 211.

II.

In holding as a matter of law that under the Act of February 18, 1888, and the Amendment of February 13, 1889, the Choctaw Coal and Railway Company was not permitted (it being assumed for the sake of argument only that the Choctaw Railway Act was a grant of title *in præsenti*) voluntarily to abandon its granted right to locate its right of way through the public domain after occupation thereof by citizens claiming a right thereto as settlers upon public lands and to proceed to acquire title to a right of way from such settlers by purchase or condemnation, with full recognition of the title, ownership or possessory right of said settlers in such lands, but that it was compelled to claim and take title through the public domain solely under the Act, even though it desired and chose to and did in fact abandon all claim to a right of way thereunder and did in fact acquire one by purchase and deed whereby it expressly contracted and agreed that the land conveyed should revert to its grantor if and when such land ceased to be used for right of way and railroad purposes.

III.

In holding that (it being assumed for the sake of argument only that the Choctaw Railway Act was a grant of title *in præsenti* and that the right of way which the Railway Company acquired over the land of petitioners' ancestors was acquired under such grant and not by purchase) the patent issued by the United States to petitioners' predecessors in title did not convey the full fee simple title to the land therein described and every right which the United States had therein, subject to the railroad right of way, but that the land included within the boundaries of said right of way was excluded from the public domain and reserved to the Railway Company and the United States and no title to the underlying fee or reversionary right therein did or could pass to the patentee by virtue of the patent, but remained in the United States, and in holding further that upon the abandonment of said right of way for railroad purposes in 1930 by the railroad successors to the Choctaw Coal and Railway Company, the title thereto reverted to the United States and not to the original patentee or his successor in title, for that the cases cited and relied on by the court to support its holding are without exception those in which there was a controversy between a patentee of a tract of land and a railroad company to which a right of way had been granted *in præsenti* by Act of Congress through the public domain over the right to the surface, or some part of the surface, while the railroad use of it for right of way continued, and for that the court overlooked or disregarded the controlling decisions of the Supreme Court of the United States in *Rio Grande Western Ry. Co.* v. *Stringham,* 239 U. S. 44, and of the Eighth Circuit Court of Appeals in *Denver & R. G. R. Co.* v. *Mills,* 220

Fed. 481, and the uniform decisions of the highest courts of other States upon the same question, including:

Oregon Short Line v. *Stalker,* 14 Ida. 362, 94 Pac. 56;
Crandall v. *Goss,* 30 Ida. 661, 167 Pac. 1025;
Hurst v. *Idaho-Iowa Lateral Canal Co.,* 34 Ida. 342, 202 Pac. 1068;
Bowman v. *McGoldrick,* 38 Ida. 30, 219 Pac. 1063;

and for that the court erroneously held that the decision of the Supreme Court of the United States in *Smith* v. *Townsend,* 148 U. S. 490, was not in point, or in so far as in point was only dictum and not controlling.

IV.

In holding that petitioners' ancestor did not by virtue of the patent issued by the United States and his deed to the Choctaw Coal and Railway Company of a right of way with express provision for the reversion thereof to the grantors, their heirs or assigns, in event it ceased to be used for railroad purposes, acquire or have any title to said reversion, but that the title thereto was in the United States and was subject to disposal by Acts of Congress prior to abandonment of the right of way by the railroad company, and that Congress did by the general Act of March 8, 1922, 42 Stat. 414, convey said reversion to the City of Oklahoma City subject to the railroad use, and that the said City succeeded to the whole title to the land involved by virtue of said Act upon the abandonment thereof for railroad purposes, for that said Act has no application in this case because it expressly provides that the reversion in a right of way to which it applies, and the whole title to the land upon abandonment for railroad purposes, shall vest in the municipality where it is situate "by virtue of the patent thereto and without the necessity of any other or further conveyance or assurance of any kind or nature whatso-

ever", and the only patent thereto by virtue of which title could so pass was the patent from the United States to petitioners' predecessors in title, for there never was a patent from the United States to the municipality, and whatever title might pass "by virtue of the patent" would of necessity pass to petitioners' predecessors in title who were the only patentee.

Summary of Argument.

The petitioners rely on the following propositions in support of their petition:

I.

The Act of Congress of February 18, 1888, as amended by the Act of February 13, 1889, was not a grant *in præsenti* of a right of way to the Choctaw Coal & Railway Company, but was merely a grant of the right to acquire a right of way by purchase or condemnation through Indian Country only, the title thereto not to vest until taken and paid for as in the Act prescribed, which proposition is established:

(a) By the language of the Act itself.

(b) By the fact that the land across which the railroad was to be located was owned in fee simple by Indian Tribes and Congress was without constitutional authority to take their private property and grant it by legislative enactment to a railroad company either for its private benefit or for public use.

(c) By congressional and departmental construction of the Act.

(d) By judicial construction of precisely the same language in other Acts of Congress of precisely the same character.

II.

A possessory right or title was acquired by the settlers on lots in the townsite of Oklahoma City on April 22, 1889, and by the homesteader on the Higgins land on the same date, which was prior and superior to every claim of right or title thereto which had not previously vested in someone else, except that of the United States, and which right or title of said settlers and said homesteader was afterwards matured by patent from the United States into a fee simple title.

III.

The title which the Choctaw Coal & Railway Co. was authorized under the Act of Congress, whether a grant *in præsenti* or not, to take in the land constituting its right of way, was a railroad easement or limited fee for railroad purposes, with the underlying fee or reversionary right in the land so taken in the Indian Tribe from which taken, and in the United States after the land was ceded to it by the Indian Tribe and became a part of the public domain, and in the settler or homesteader when the land was patented to him by the United States.

IV.

The provisions of the Choctaw Railway Act were inoperative in the public domain, or if operative therein were not exclusive and mandatory, but the Railway Company could decline to take its right of way under that Act and could acquire a right of way by purchase or condemnation of lands of settlers and homesteaders, if it chose, and in these cases it did, in compromise settlement of a substantial *bona fide* legal controversy and for a valuable consideration, in fact abandon its claim to a right of way under the Act across the land here involved, and did in fact acquire such right of way

by purchase from individual owners to whom the full fee simple title had been conveyed by the United States, and did in fact take title to such right of way by deed containing the express provisions that upon abandonment of the land for railroad purposes the full title thereto should revert to the grantors, their heirs and assigns, whereby it estopped itself to deny its grantors' title, or to claim title thereto derived from any other source, and bound itself to recognize and maintain its grantors' title.

V.

The City of Oklahoma City acquired no title or right to the abandoned right of way of the railroad company under the Act of March 8, 1922, 42 Stat. 414, providing for the disposition of abandoned or forfeited railroad rights of way granted through public lands, and if that Act be construed to grant the right of way here involved to said City then it is violative of the Fifth Amendment to the Constitution of the United States.

ARGUMENT AND AUTHORITIES.

First Proposition.

The Act of Congress of February 18, 1888, as amended by the Act of February 13, 1889, was not a grant *in præsenti* of a right of way to the Choctaw Coal & Railway Company, but was merely a grant of the right to acquire a right of way by purchase or condemnation through Indian Country only, the title thereto not to vest until taken and paid for as in the Act prescribed, which proposition is established:

(a) The proposition stated is supported by the language of the Act itself.

It is elementary that in construing a legislative act the first step is an examination of the language of the act it-

self. Reference is made to page 26 of the Record, where the Act is printed in full.

It will first be observed that its title is:

> "An Act to authorize the Choctaw Coal and Railway Company to construct and operate a railway through the Indian Territory, and for other purposes."

There is a careful avoidance of the word "grant" in this title. It is not denominated a grant and does not purport to grant a right of way, but merely confers authority. The extent and limitations of this authority and the manner of its exercise are set out in the body of the Act itself. While the title is not a part of the Act, nevertheless the language of it is significant as to the intention of Congress.

The Act itself contains no granting word nor any word that imports a present conveyance of title. It provides (Section 1) that the railway company is "invested and empowered with the right of locating, constructing, owning, equipping, operating, using and maintaining a railway, etc.," and (Section 2) that the corporation is "authorized to take and use for all purposes of railway, and for no other purpose, a right of way one hundred feet in width * * * and to take and use a strip of land two hundred feet in width, with a length of three thousand feet, in addition to right of way, for stations, for every ten miles of road, etc." This language in its ordinary meaning and interpretation does not import a grant of immediate title. It is merely the granting of authority, and power.

In *United States* v. *Ft. Smith & Western Ry. Co.*, 195 Fed. 211 (8th C. C. A.), Judge Sanborn refers to the Act as the grant of a "franchise to construct, etc." This case is quoted herein *infra*.

Again the act does not purport to be an immediate and completed grant or donation of right of way and station grounds, but authorizes the taking thereof by certain pro-

cedure and upon compensation for what is actually taken.

Section 3 provides for compensation to "individual occupants according to the laws, customs and usages of any of the Indian nations or tribes," for their property taken or damaged before the same can be taken for a right of way. The method of ascertaining the amount of such damages is prescribed in detail and these must be ascertained and paid in advance of the taking.

Section 5 provides that the railway company shall pay to the Secretary of the Interior for the benefit of the Nation or Tribe of Indians through whose lands the railway is located, the sum of $50.00 per mile, in addition to the compensation for property taken and damage done to individual occupants by the construction of the railway, and that if the Nation or Tribe was dissatisfied with such allowance, then the compensation to be paid for the right of way taken should be determined by three disinterested referees from whose award either party might appeal to the United States District Court at Fort Smith, Arkansas, or for the Northern District of Texas, which court should determine the subject matter according to the *laws of the State* in which the case was heard *for determining damages when property is taken for* railroad purposes. This language can only mean provision for the acquisition of a right of way by condemnation proceedings and full compensation for the land taken. This is additional compensation for the right of way to be taken.

Section 6 provides that the railway company shall file location maps in the office of the Secretary of the Interior and in the office of the chief of each of the nations or tribes through whose lands the railway may be located, and that after the filing of such maps "no claim for a *subsequent* settlement and improvement upon the right of way shown by said maps shall be valid as against said company."

If the act were a present grant of title, then the railway company would not be required to pay for any settlement or improvement on the line of its road *subsequent to the enactment of the law.* But to the contrary there is specific provision that it must pay for all individual rights and compensate all individual damages by reason of occupation, settlement and improvements in advance of the filing of its location map, even though these are *subsequent to the enactment of the law.*

In the Indian Country there was no private ownership of land and the only individual rights to be compensated were those of settlement and improvement. But after the land became public domain and title to it in severalty could be and was acquired by individual owners, then the rights to be paid for and damages to be compensated upon location of the road across such land included not only all settlement and improvement rights and property, but title to the land itself. This shows that the act was never intended to apply to land in the public domain.

(b) The proposition stated is supported by the fact that the land across which the railroad was to be located was owned in fee simple by Indian Tribes and Congress was without constitutional authority to take their private property and grant it by legislative enactment to a railroad company either for its private benefit or for public use.

The location of the line of road authorized in the Act of February 18, 1888, from a point on Red River to a point south of the center of the west boundary of Arkansas was entirely in Choctaw and Chickasaw country. These tribes owned their land by a fee title under treaty grant and patent conveyance from the United States. Article II, Treaty of Dancing Rabbit Creek, September 15, 1830, 7 Stat. 333;

Article I, Treaty of Washington, June 22, 1855, 11 Stat. 611.

The Creeks likewise held their lands by a fee simple title. By the Treaty of Washington, January 24, 1826, 7 Stat. 286, the Creek Nation ceded to the United States part of their land in Georgia and the United States agreed to purchase for them a country west of the Mississippi to which they might remove.

By Act of Congress of May 28, 1830, 4 Stat. 411, the President was authorized to exchange land belonging to the United States west of the Mississippi River for land of the Creek Indians to the east thereof, and it was provided that in event of such exchange the "United States will forever secure and guarantee to them, and their heirs and successors, the country so exchanged with them; and if they prefer it, that the United States will cause a patent or grant to be made and executed to them for the same," but with the proviso that such lands should revert to the United States if the Indians should become extinct or abandon them.

By the Treaty of Washington, March 24, 1832, 7 Stat. 366, the Creek Indians ceded to the United States all their land east of the Mississippi and the United States ceded to them a country west of the Mississippi under a solemn guaranty of such country to them and that it would "cause a patent or grant to be executed to the Creek Tribe."

By the Treaty of Fort Gibson, Indian Territory, February 14, 1833, 7 Stat. 417, the boundaries of the Creek Country were defined as between the Creeks and the Cherokees, and the United States again promised to "grant a patent, in fee simple, to the Creek Nation of Indians for the land assigned said Nation by this treaty or convention."

Pursuant to that treaty, under date of August 11, 1852, a patent was executed by Millard Fillmore, President of the United States, to the Creek Nation, conveying their

lands described, which patent is recorded in Vol. 4 of Indian Deeds in the Office of Indian Affairs, pages 446 and 447 (R. 136).

By the Treaty of Washington, August 7, 1856, 11 Stat. 699, the boundary between the Creek Country and the Seminole Country which had been in dispute was settled and by Article 3 the United States solemnly guaranteed "to the Creek Indians, the lands included within the boundaries defined in the second article hereof * * * by the same title and tenure by which they were guaranteed and secured to the Creek Nation by the fourteenth article of the Treaty of March 24, 1832, the third article of the Treaty of February 14, 1833, and by the letters patent issued to the said Creek Nation on the 11th day of August, 1852."

By the Treaty of Washington, June 14, 1866, 14 Stat. 785, the Creeks for a consideration of $975,168.00, ceded to the United States the western half of their entire domain in trust "to be sold to and used as homes for such other civilized Indians as the United States may choose to settle thereon." They continued to hold the eastern half—lying east of the line between what is now Lincoln County and Creek County in the State of Oklahoma—by a fee simple title.

This was the condition of the Indian title to the land through which the Choctaw Railway Company was authorized to construct a railroad under the Acts of 1888 and 1889 at the time those Acts were enacted. All of it was fee title except the western half of the Creek domain, and this was held in trust by the United States for a specific purpose which did not include the granting of any of it to a railroad company for a right of way.

Under the Fifth Amendment to the Constitution, Congress was without power to take the private property of these Indian Tribes and transfer it by legislative act to a

railroad corporation to be used for railroad purposes, so that by operation of such legislative act alone the Indian Tribe would be divested of title.

It is an elementary rule in the construction of statutes that if a statute is susceptible of two interpretations, under one of which it will be unconstitutional and void and under the other of which it will be constitutional and valid, the latter must be accepted. Here the contention that the Choctaw Railway Act was a grant of a present vested title to a right of way effective on the enactment of the law, is not only contrary to the ordinary meaning and plain import of the language used, but would render the act contrary to the constitution and void, and hence no such construction can be placed upon it.

(c) The proposition is supported by Congressional and Departmental construction of the Act.

A search of the statutes at large reveals that beginning with August 2, 1882, and ending with February 28, 1902, Congress enacted 38 special acts authorizing various railroad corporations to acquire a right of way through the Indian Territory. The St. Louis and San Francisco Act of August 2, 1882, 22 Stat. 1881, the Gulf, Colorado & Santa Fe Act, 23 Stat. 69, and the Southern Kansas Act, 23 Stat. 73, being the first three of these, are each entitled "An Act to grant a right of way, etc.," and in the text of each it is provided that "a right of way is hereby granted." The form of the St. Louis and San Francisco Act is quite different from all those that follow, but in substance it is the same. Beginning with the Gulf, Colorado & Santa Fe Act, Congress adopted a form for such acts which is followed almost literally, except as to the name of the company and the termini and location of the road, in the remaining 36 acts. But in the fourth of these special acts, the Kansas & Arkansas Valley Act, 24 Stat. 73, the language of the title

is changed from that used in the three preceding ones by omitting the words "to grant," and making it read instead "An Act to authorize, etc." A similar change is made in the text of the act itself, so that instead of reading "a right of way is hereby granted," it reads that the company "is authorized to take and use for all purposes of a railway, etc." This change of language in title and in text is followed in all the subsequent acts. It seems evident that Congress regarded the word "grant" as inappropriate and misleading, because no grant was intended and none was in fact made, and so, in order to use appropriate and unambiguous language, substituted the expression "authorized to take" for "granted." The change certainly is significant, else why was it made.

Congress in later legislation in respect of this same act adheres to the idea that it is merely a grant of the right to acquire a right of way. In the Act of August 24, 1894, 28 Stat. 502, the creditors and stockholders of the Choctaw Coal and Railway Company, which had become insolvent, were reorganized into a new corporation created by that act and were given the property and the rights and privileges of the original corporation. The new corporation became known as the Choctaw, Oklahoma & Gulf Railway Company. Section 4 of this act provides as follows:

> "That it shall and may be lawful for such new corporation to construct and operate branches from its said railroad and for such purpose to take and use rights of way not exceeding one hundred feet in width upon making compensation therefor as provided in the case of taking land for its main line * * *: Provided, that the *right to construct branches conferred by this section* shall exist and be exercised *in the Indian Territory only* for the purpose of developing the leases mentioned, etc." (Italics supplied.)

This provision merely *makes lawful* and *confers the right* for construction of these branches upon the same terms as for "taking land for its main line."

Again by Section 2 of the Act of April 24, 1896, 29 Stat. 98, it is provided that the company may build branches to its coal mines and that the powers conferred upon it shall extend "to the construction and operation of a branch from any point on its existing line of railroad to the northern line of the State of Texas, and for this purpose the said company shall have the like rights, powers and franchises *as to the acquisition of a right of way and depot grounds,* and as to the construction and operation of the said branch," as had been previously conferred (italics supplied). The provision that the company should "have the like rights, powers and franchises as to the *acquisition* of a right of way and depot grounds" is a significant indication that Congress considered the original grant to be not of a vested title to a right of way, but only of rights, powers and franchises *to acquire* a right of way and depot grounds.

Again on March 28, 1900, 31 Stat. 52, Congress passed an Act entitled: "An Act enlarging the powers of the Choctaw, Oklahoma and Gulf Railroad Company." Section 2 provides that the *powers conferred* by previous legislation,

> "shall be so construed as to authorize the construction and operation of the railroad and branches thereby or hereby authorized through and over any Indian reservations, subject to the payment of compensation provided for in such Acts as to the land in the Indian Territory, and through and over any Indian allotments, subject to the compensation provided by the laws of Oklahoma."

This was an act, not curtailing, but enlarging the powers of the company. It refers, not to former grants, but to

powers conferred, and provides that these shall be "so construed as to *authorize* the construction of branches *subject to the payment of compensation*, etc."

This legislation bears out the interpretation of the original Act that it was a grant of powers and authority and not of title, and that it was intended to be and was applicable only to the Indian Territory or to Indian reservations where the land was owned by a tribe in common, and was not applicable to a case where an individual title in severalty had attached to a particular tract of land. Thus where a right of way is taken across an Indian allotment, the compenstion to the Indian allottee is not to be subject to the provisions of the act, but to that provided by the laws of Oklahoma. By analogy when a portion of Indian Territory was by act of Congress made a part of the public domain and opened to settlement under the homestead law and a homesteader acquired title, or an inchoate title, to a particular tract of land, then the company's right to locate a right of way across his land was "subject to the compensation provided by the laws of Oklahoma." This is in accord with the view of President Harrison in his veto message of the Oklahoma City bond bill, and of Justice Van Devanter in his opinion as an Assistant Attorney General, and of the Eighth Circuit Court of Appeals in *United States v. Ft. Smith & W. R. Co.*, 195 Fed. 211, to all which further reference is made below.

The Oklahoma Supreme Court in its decision quotes a garbled excerpt from Section 12 of the Act of March 2, 1889, 20 Stat. 1003, to the point that that Act indicates a Congressional construction of the Choctaw Railway Act as a grant *in præsenti* of a right of way. The full text of the excerpt partly quoted is that the release and extinguishment of the Indian rights,

> "shall not inure to the benefit of or cause to invest in any railroad company any right, title, or interest what-

ever in or to any of said lands, and all laws and parts of laws so far as they conflict with the foregoing, are hereby repealed, and all grants or pretended grants of said lands and interest or right therein now existing in or on behalf of any railroad company, except rights of way and depot grounds, are hereby declared to be forever forfeited for breach of condition."

The quotation is logically and grammatically divided into two parts. In the first part it is declared that the release conveyance by the Creeks and Seminoles and the extinguishment of their title:

> "Shall not inure to the benefit of or cause to vest in any railroad company, any right, title or interest whatever in or to any of such lands, and all laws and parts of laws, so far as they conflict with the foregoing, are hereby repealed."

The ordinary interpretation and meaning of this language is that no railroad company which had been authorized to construct a railroad through these Indian lands and granted the power of eminent domain to condemn and take a right-of-way therefor should profit by the extinguishment of the Indian title, nor be permitted to claim that title to its authorized right-of-way thereby vested free of the Indian title and right to compensation, and free of all obligation to acquire title in a lawful manner from the United States or any other successor in title to the Indians. Instead of this provision recognizing the Choctaw Railway Company's authorized right-of-way as a grant of title *in præsenti*, as the Court held, it does exactly the contrary and wholly refutes and denies that conclusion.

The second part of the quotation provides that:

> "All grants or pretended grants of said lands, or any interest or rights therein now existing in or on behalf

of any railroad company, except rights-of-way and depot grounds, are hereby declared to be forever forfeited for breach of condition."

It is difficult to see any support in this language for the contention that the Choctaw Railway Act grants a right-of-way *in præsenti*. There is no reference to any specific railroad company. It plainly indicates that there had been grants or pretended grants of lands, or interests or rights therein, to railroad companies, other than for a right-of-way, for it is these grants which are expressly forfeited. Rights-of-way and depot grounds are excepted from the forfeiture clause.

The Oklahoma Supreme Court further in support of its claim that subsequent Acts of Congress have indicated a congressional construction of the Choctaw Railway Act as a grant *in præsenti* of a right of way quotes a part of Section 18 of the Organic Act, approved May 2, 1890, 26 Stat. 81. The full text of this statute on the point to which quoted is as follows:

"No part of the land embraced within the Territory hereby created shall inure to the use or benefit of any railroad corporation, except the rights of way and land for stations heretofore granted to certain railroad corporations. Nor shall any provisions of this Act or any act of any officer of the United States, done or performed under the provisions of this Act or otherwise, invest any corporation owning or operating any railroad in the Indian Territory, or Territory created by this Act, with any land or right to any land in either of said Territories, and this Act shall not apply to or affect any land which, upon any condition on becoming a part of the public domain, would inure to the benefit of, or become the property of, any railroad corporation."

This language is neither a reservation of land for the benefit of any railroad company, nor a grant of land to it, but is a mere repetition of the denial contained in the Act of March 2, 1889, of any right or title in railroad corporations to any land except their rights of way and station grounds previously granted. The obvious purpose of this provision is to preserve the *status quo*. The plain intent is that no railroad corporation should acquire anything by virtue of the Act that it did not have before, nor in any way profit or gain by the Act, and equally that it should not be denied or deprived of any property or property right which it had before.

In the construction of a statute, it is proper and often helpful, in event of any doubt as to its meaning, to resort to the debate on it in the legislative body which enacted it for an expression of the intention of the legislators.

Referring to the Congressional Record, we find that the bill for the Act of February 18, 1888, was introduced in both Houses of Congress at about the same time and in each was referred without debate to the Committee on Indian Affairs. In each body this committee soon reported recommending its passage with amendments. The Senate accepted the amendments, passed it and sent it to the House. The principal amendment made by the Senate was the insertion of the following language in Section 1:

> "also, a branch of railway to be constructed from the most suitable point on said main line for obtaining a feasible and practicable route in a northwesterly direction to the leased coal veins of said Choctaw Coal and Railway Company in Tobucksey County, Choctaw Nation;"

When the bill came up in the House Mr. Allen of Mississippi was in charge. There was some debate as to whether the compensation provided for the Indians was adequate

and the provision for appraisers for fixing additional compensation was satisfactory, but the principal discussion was as to the amendment authorizing a branch line to the company's coal veins. On this the following occurred:

"Mr. Weaver: And that this is a proposition to condemn this right of way for this spur line 18 miles long. Therefore, it is a proposition to condemn land for the benefit of a corporation and not for the benefit of the public, because it is a private corporation that owns those coal lands. I am not making objection to the bill, but I suggest to the gentlemen the question whether we have the constitutional power to do that.

"Mr. Allen of Mississippi: I do not see any trouble about the constitutional power if we have the right to condemn land for railroad purposes. This branch is to be a public road and is to be under the same limitations as to the rights of the public as the main line. There will be no distinction on that point. This branch will be just as much a public highway, and the public will have a right to transport their property over it and to travel over it the same as over the main line."

* * * * * * *

"Mr. Holman: * * * The other point is that this spur road, 18 miles long, which runs into the land owned jointly by the Choctaws and Chickasaws, is really in the nature of a private enterprise, and this bill proposes to confer upon this corporation powers of eminent domain, so to speak, to appropriate the property of these Indians, subject to certain conditions, for the benefit of a purely private enterprise. This is the matter to which I wished particularly to call the attention of the gentleman from Mississippi."

Mr. Allen explained that the public would be interested, and the Indians particularly, in the development of the coal veins and the transportation of coal over the proposed branch, and the bill passed as amended without a

roll call. Congressional Record, 50th Congress. 1st Session, Vol. 19, Part 2, p. 1115.

From the foregoing it seems clear that Congress in the enactment of the law regarded it, not as a present grant of a right of way, but as conferring upon the company the power of eminent domain for the acquisition of a right of way by condemnation. This power could only be conferred for a public purpose and doubt was expressed whether the branch line was a public instead of a private purpose. The main line was admittedly a public purpose and no doubt existed of the propriety of conferring the power of eminent domain as to it.

The executive department of the Government has also had occasion to construe and interpret the Choctaw Railway Act. Attention is called to the message of President Harrison dated January 26, 1891, vetoing the act to authorize Oklahoma City to issue corporate bonds to the amount of $40,000 for the purpose of providing a right of way for the Choctaw Railway Company through the city. This message appears in full in the Record beginning at page 220. The President pointed out that "no legal location was made by the railway company prior to the acquisition of the land by occupying settlers," and that if the company claimed under the general statute of the United States providing for a railroad right of way through public domain to any railroad complying with its provisions, 18 Stat. 482, then that statute distinctly saved the right of any settler who had located prior to the filing of the location map of the road and its approval by the Secretary of the Interior, and that if the company claimed under the Choctaw Railway Act of February 18, 1888, the provisions of that act plainly protected the right of any occupying claimant. Then he further expressed the opinion that this act, "was intended to grant a right of way only through Indian land, and if

these lands were not such, the general statute to which I have referred would apply; but in either event the conclusion would be the same." This for the reason that whether under the general Act of March 3, 1875, 18 Stat. 482, or under the Choctaw Act, a settler or occupying claimant whose settlement was made and whose rights attached prior to the filing of the map of location of the road was entitled to compensation for his rights, whatever they might be, before the company could acquire a right of way. Then the President indicates that the company was so devoid of any just claim to a right of way that its controversy with the lot settlers was only a sham, not a "real controversy, doubtful as to its issue."

We emphasize the point made that the act, judged by its terms, was intended to apply to *Indian land only.* So when the land here involved ceased to be Indian land and became part of the public domain and subject to occupation by settlers, then the Choctaw Railway Act by reason of the changed conditions could not be made to apply. It simply did not fit the conditions then existing. Its provisions were inappropriate and not workable under such changed conditions. The company's recourse then was to proceed under the general statute, 18 Stat. 482, now appearing as Section 934, Title 43, U. S. Code.

In 1898 the Choctaw Railroad Company was building its line westward from Fort Reno and sought a right of way across allotted lands of the Cheyenne and Arapaho Indians. It contended that the Choctaw Railway Act, as amended, granted it the right of way across these allotments and that its title under such grant vested at the enactment of the act and hence was prior in time and superior in right to the title of the allottees. It offered to pay the Indian allottees for their improvements, but contended that the Indian allottee had no valid claim for compensation for the right of way across his land. In this situation the Secretary of

the Interior applied to the Attorney General for an opinion on the legal question involved. This opinion was prepared by Willis Van Devanter, then Assistant Attorney General of the United States and now Associate Justice of the Supreme Court of the United States. It is reported in Volume 27 of Decisions of the Department of the Interior Relating to Public Lands (Land Office Decisions) 414.

We point out by way of emphasis that Justice Van Devanter took the view that the language of the Choctaw Railway Act was "not of an absolute grant *in praesenti* of a right of way," and that the company was merely "authorized to employ the government's power of eminent domain," and also that by the language of the act it was applicable only while the land remained Indian lands;

> "The plan provided for ascertaining the damages is not practicable under the changed conditions of the title to the land and the people holding it. These people are now citizens of the United States, and hold their lands under an assurance from the United States of a future conveyance and not under the usages and customs of any Indian Tribe."

So when the land involved in these lawsuits ceased to be Indian land and not held under the usages and customs of any Indian Tribe, and became public domain of the United States, and citizens of the United States settled upon and occupied it and acquired rights in it, and took such steps under the law as gave them assurance from the United States of a future conveyance of the fee title, then the conditions had so changed that the provisions of the Choctaw Act were no longer applicable, and the only recourse of the railway company to acquire title through the public domain was the general statute of March 3, 1875, which expressly made the rights of homesteaders and settlers, where prior in time, superior to the right acquired by a railroad company upon filing a map of location of its road.

Further argument on this point would be only a restatement of what Justice Van Devanter has already so forcibly said in the opinion cited. We earnestly ask the Court to read that opinion in full. It construes the identical Act here under consideration and has stood as the law for over 35 years. And it presents the petitioners' case better than their counsel can possibly present it here.

(d) The proposition stated is supported by judicial construction of precisely the same language in other Acts of Congress of precisely the same character.

In the case of *Cherokee Nation* v. *Southern Kansas Railway Company*, 33 Fed. 900, the Court had before it for consideration the Southern Kansas Railway Act granting a right of way through the Indian Territory. This act, already referred to herein, is literally identical with the Choctaw Railway Act, except as to the name of the railway company concerned and the termini and location of the proposed road, and except that in the Southern Kansas Act the title and text use the expression "grant" of a right of way while in the Choctaw Act the expression is "authorized to take and use" a right of way. From the language of the two acts, it would appear that if either could be construed to be a grant of vested title *in praesenti* to a right of way, it would be the Southern Kansas Act.

Under that act the Southern Kansas Railway Company was about to build south from Kansas through part of the Cherokee Nation the line of road which is now the Santa Fe through Oklahoma City. The Cherokee Nation filed a bill in equity to enjoin the road from coming through its country. Its principal contention was that the Cherokee Nation was a sovereign state owning its land in fee, and that the Congress of the United States was without authority to exercise, or to grant the right to exercise, the power of eminent domain over land within its boundaries

and take any of such land for public use. The court set out the substance of the Act of Congress involved, and after an exhaustive discussion of the subject of the right and function of the power of eminent domain, denied the bill. It held that Congress had the right to exercise the power of eminent domain, and hence to grant it to a corporation to exercise, for a public use, and that a railroad was a public use.

In the opinion it is said:

> "The controlling question in this case is, did the Congress of the United States have the right to grant to defendant a right of way for its railroad across or over the land of the Cherokee Nation, the defendant paying the nation for the same, and the individual occupants for their improvements? * * * Congress can only have this right, either because the title of this real estate is in the United States, or because the government of the United States can exercise what is called the 'right of eminent domain,' and take the property, or authorize a railroad to take it, on its paying just compensation to the owners, by the exercise of the power growing out of this right. This Court held in *U. S.* v. *Reese*, 5 Dill. 405, and in *U. S.* v. *Rogers*, 23 Fed. Rep. 658, that the title to the lands of the Cherokees was obtained from the United States by grant. This title is a base, qualified, or determinable fee, without right of reversion, but only the possibility of reversion, in the United States. This, in effect, puts all the estate in the Cherokee Nation. This is in substance the principle declared by the Supreme Court of the United States in *Holden* v. *Joy*, 17 Wall. 211. *Congress could not, therefore, without the consent of the Cherokee Nation, and individual occupants of its land, grant to defendant this right of way because the United States had title to the land, or because it was either a part of the public domain, or a reservation belonging to the government. If it can be done at all, it must be because the government of*

the United States can exercise, with reference to the lands of the Cherokee Nation, the right of eminent domain. If the government does not have this right, then the act of Congress purporting to grant the right of way is void, because of the absence of constitutional power to pass it.

* * * * * * *

"Congress, then, used this attribute of sovereignty in a proper case, when it permitted the defendant company, not to say when eminent domain should be exercised, but, as the agent of the public, to use the fruits or effects of the exercise of the rights as a means of constructing its road, to promote the public interest." (Italics supplied.)

The Cherokee Nation appealed this case from the District Court to the Supreme Court of the United States. That Court in its decision copies the entire railway act involved, and after a most exhaustive discussion, in an opinion by Justice Harlan, upholds the act as a proper exercise of the power of eminent domain. *Cherokee Nation* v. *Southern Kan. Ry. Co.*, 135 U. S. 641, decided May 19, 1890. The portion of this decision applicable here is that which holds that the act merely confers upon the railway company the right and power to purchase and acquire a right of way through the Indian country by condemnation proceedings, and that no title to such right of way vested in the railway company until it had been located and paid for in the method prescribed by statute. We quote from the opinion as follows:

"In view of these authorities, the contention that the lands through which the defendant was authorized by Congress to construct its railway are held by the Cherokees as a sovereign nation, without dependence on any other, and that the right of eminent domain

within its territory can only be exercised by it, and not by the United States, except with the consent of the Cherokee Nation, cannot be sustained. The fact that the Cherokee Nation holds these lands in fee simple under patents from the United States is of no consequence in the present discussion; for the United States may exercise the right of eminent domain, even within the limits of the several states, for purposes necessary to the execution of the powers granted to the general government by the constitution. * * *

"In the present case the requirements of the constitution have, in our judgment, been fully met. The third section provides that, before the railway shall be constructed through any lands proposed to be taken, full compensation shall be made to the owner for all property to be taken or damage done by reason of the construction of the road. In the event of an appeal from the finding of the referees, the company is required to pay into court double the amount of the award, to abide its judgment; and, that being done, the company may enter upon the property sought to be condemned, and proceed with the construction of its road.

"The plaintiff asks what will be its condition as to compensation if, upon the trial *de novo* of the question of damages the amount assessed in its favor should exceed the sum which may be paid into court by the defendant. This question would be more embarrassing than it is if, by the terms of the act of Congress, the title to the property appropriated passed from the owner to the defendant, when the latter, having made the required deposit in court, is authorized to enter upon the land pending the appeal, and to proceed to the construction of its road. *But clearly the title does not pass until compensation is actually made to the owner.* Within the meaning of the constitution the property, although entered upon pending the appeal, *is not taken until the compensation is ascertained in some legal mode, and, being paid, the title passes from the owner.* Such was the decision in *Kennedy* v.

Indianapolis, 103 U. S. 599, 604, where the court construed a clause of the Constitution of Indiana declaring that no man's property 'shall be taken or applied to public use * * * without a just compensation being made therefor,'—substantially the provision found in the national constitution. This court there said that, 'on principle and authority, the rule is, under such a constitution as that of Indiana, that the right to enter on and use the property is complete as soon as the property is actually appropriated under the authority of law for a public use, *but that the title does not pass from the owner without his consent until just compensation has been made to him.*' In the case now before us the property in respect to which the referees made the award *will be conditionally appropriated for the public use when the defendant makes a deposit in court of double the amount of such award,* and it only remains to fix the just compensation to be made to the owner. *But the title has not passed, and will not pass, until the plaintiff receives the compensation ultimately fixed by the trial de novo provided for in the statute.* So that, if the result of that trial should be a judgment in its favor in excess of the amount paid into court, *the defendant must pay off the judgment before it can acquire the title to the property entered upon, and failing to pay it* within a reasonable time after the compensation is finally determined, *it will become a trespasser, and liable to be proceeded against as such;* and, in such case, if the plaintiff shall sustain damages by reason of the use of its property by the defendant pending the appeal, the latter must be liable therefor. The apprehension, therefore, that the plaintiff may lose its property without receiving just compensation therefor is without foundation.''

The following reasoning must be true. The proper and only possible construction of the Choctaw Railway Act at the time of its enactment must be the construction of it at all times and places so long as it remains a law. It could not be given one construction in 1888 and another in

1889. It could not be given one construction in the Choctaw and Chickasaw Country and another in the Creek Country. It could not be given one construction in the eastern half of the Creek domain and another in the western half. It could not be given one construction in the Indian Country and another in the public domain. And when enacted in 1888, being by its terms applicable only in Choctaw and Chickasaw Country, it could not properly or possibly be construed as a grant *in praesenti* of a right of way through that country. This for the reasons set forth in the *Cherokee Nation case, supra.* Neither could it, for the same reasons, be construed in February, 1889, as a grant *in præsenti* through the eastern half or the western half of the Creek domain, or, after March 1, 1889, the public domain.

In *United States* v. *Ft. Smith & W. R. Co.,* 195 Fed. 211, the Circuit Court of Appeals for the Eighth Circuit had before it for consideration the Fort Smith & Western Act of March 3, 1899, 30 Stat. 1368. This act is identical with the Choctaw Act in every respect except as to the name of the railway company and the termini of the proposed road.

The line of the road *was through lands of the Creek Nation.* After the act was enacted these lands were allotted in severalty to members of the Nation. In constructing its road the company purchased from the allottees and paid for the right of way and damages for improvements. Afterward the United States brought suit to recover the $50 per mile which the act provided the company should pay to the nation for its right of way through the tribal lands. The court held the act merely conferred the right of eminent domain and the right to acquire a right of way, and that by reason of the changed conditions when the land became allotted in severalty to members of the tribe, the provision for payment of $50 a mile to the nation was no longer applicable, and that the United States could not recover any-

thing on that ground for the benefit of the nation as a whole.

The opinion is also especially pertinent here because the court considers the case of *St. Joseph & Denver R. Co.* v. *Baldwin*, 103 U. S. 426, and holds that it has no application. It was upon authority of this case that the Supreme Court of Oklahoma Territory in the case of *Churchill* v. *The Choctaw Railway*, 4 Okla. 462, 46 Pac. 503, reached the conclusion that the Choctaw Act was a grant to the railway company of a vested title *in praesenti* to a right of way. And it was upon authority of both of these cases that the Supreme Court of Oklahoma based its decision in the instant cases.

In its opinion the Circuit Court of Appeals said:

> "By Section 1 of the Act of March 3, 1899 (Chapter 453, 30 Stat. 1368), *Congress granted to the railroad company the franchise to construct, maintain, and operate its railroad through the Creek Nation.* By Sections 2, 3, 4 and 7 it authorized that railroad company to exercise the power of eminent domain to take and use its right of way through that nation on condition that it should make full compensation to the owners and occupants of the the lands over which it was constructed therefor.
>
> * * * * * * *
>
> "The right and title to the allotments over which the right of way is here in question had vested in the allottees under this legislation and the Creek Nation had parted with all its title thereto subsequent to the Act of March 3, 1899, granting to the railroad company its right to construct a railroad through the Creek Nation and prior to June 20, 1901, when the railroad company first filed its map of definite location of its railroad across these allotments. *The second, third and seventh sections of the act merely granted, not the right of way through these lands, but the right to exercise the power of eminent domain, the power 'to take and use*

*for all purposes of a railway * * * and right of way,'* upon condition that full compensation should be made, first, to the nation for injury to its title, and, second, to individuals for injury to their improvements and their rights of occupancy.

* * * * * * *

"But counsel cites decisions in *Railroad Company* v. *Baldwin*, 103 U. S. 426, 430, 26 L. Ed. 578; *Nielson* v. *Northern Pacific R. Co.*, 184 Fed. 601, 106 C. C. A. 581, and in like cases to the effect that the grants of rights of way there considered were *in praesenti*, and all parties taking public lands subsequent to those grants took subject to them, and he argues that the grant in the act of March 3, 1899, was of the same character, that it vested in the railroad company the right of way over these allotments at the time it was enacted, that this right of way was reserved from these allottees by Section 24 of the Act of March 1, 1901, and that the allottees took no title to the land on which it was subsequently located, but that title remained in the Creek Nation. *The grants under consideration in the cases cited, however, were absolute grants by the United States of rights of way over lands which the United States owned. It did not own the lands of the Creek Nation, and its Act of March 3, 1899, did not grant any right of way through them. It merely gave to the railroad company the power of eminent domain*, the power to take a right of way over these lands from third parties, and the occupants of them upon payment of full compensation to them therefor. *The right of way under this act, therefore, never vested in the railroad company until it filed its map of definite location* on June 20, 1901, *and made or secured to the owners and occupants payment of compensation for its taking.*" (Italics supplied.)

Must not the language in the Choctaw Railway Act, identical with the language of the Ft. Smith and Western Act

construed and applied in the foregoing case to lands in the Creek Nation, be given the same construction and application in the instant cases?

The Supreme Court of Oklahoma cites decisions of the Supreme Court of the United States in support of its holding in these cases that the Choctaw Railway Act granted a title vesting *in praesenti*, but the cases cited deal with grants of a right of way through the public domain in language wholly different from that of the Choctaw Railway Act. Yet for some reason the Oklahoma court entirely ignores the difference in the language of the Acts.

The case of *Missouri, K. & T. R. R. Co.* v. *Kansas Pac. R. R. Co.*, 97 U. S. 491, is cited. There the Court refers to the Act under consideration as follows:

> "Its language is, 'That there be and is hereby granted' to it the odd sections mentioned; words which import a grant *in præsenti* and not one *in futuro*, or the promise of a grant."

The case of *St. Joseph & D. C. R. Co.* v. *Baldwin*, 103 U. S. 426, is cited. The Act of Congress there under consideration reads as follows:

> "That the right of way through the public lands, be and the same is hereby, granted, etc."

Of this language the Court said that it is:

> "In terms of a grant *in praesenti*. The Act is a present grant."

The case of *United States* v. *Southern Pacific Railroad Co.*, 146 U. S. 570, is cited. There the Court said of the Acts under consideration:

> "The grants to both the Atlantic & Pacific and the Southern Pacific Companies were grants *in praesenti*.

> The language is, 'there be, and hereby is, granted.' The construction and effect of such words of grant have often been considered by this court."

All the cases cited by the Oklahoma court to this point are of the same character and there is no need to consider more of them. The error in relying on decisions construing Acts of Congress, which in the plainest language purport to give an immediate vested grant, in support of the holding that the Choctaw Railway Act, being entirely different in language and having no expression or word therein indicating a grant *in praesenti*, should be given the same construction, is too obvious for comment.

Second Proposition.

A possessory right or title was acquired by the settlers on lots in the townsite of Oklahoma City on April 22, 1889, and by the homesteader on the Higgins land on the same date, which was prior and superior to every claim of right or title thereto which had not previously vested in someone else, except that of the United States, and which right or title of said settlers and said homesteader was afterward matured by patent from the United States into a fee simple title.

It is shown by the evidence in these cases that on the stroke of 12 o'clock noon on April 22, 1889, there was a rush of settlers into that part of the public domain termed Oklahoma Territory, then opened to settlement by previous proclamation of the President. In an incredibly short time thousands of people swarmed over the area which they expected to become, and which did become, the original townsite of the city of Oklahoma City, and staked and occupied town lots there. Likewise thousands of quarter sections of land were occupied and staked by homesteaders. These facts are a matter of history, as well as of

record in these cases, and the Court will take judicial notice of them.

Smith v. *Townsend*, 1 Okla. 117, 133, 29 Pac. 80;
City of Guthrie v. *Beamer*, 3 Okla. 652, 673, 41 Pac. 647.

Under the law applicable to the public domain generally the lot claimants who on April 22, 1889, staked and occupied lots in the contemplated townsite of Oklahoma City acquired a possessory right and title to such lots which was good against all the world except the United States. The title remained, of course, in the United States and subject to disposition by it, and as against it the lot claimant acquired no legal right. His possessory right was the subject of bargain and sale and of contracts with respect thereto which were valid. This because it was the uniform policy of the United States to recognize the rights of such claimants and to give them a preference in acquiring and perfecting title to the lot when the land was sold or offered for sale, or became subject to entry as a townsite. This principle of law is not controverted by the respondent in these cases:

Cofield v. *McClelland*, 16 Wall. 331;
Lamb v. *Davenport*, 18 Wall. 313;
Hussy v. *Smith*, 99 U. S. 22;
Stringfellow v. *Cain*, 99 U. S. 610;
Connor v. *Pratt*, 99 U. S. 619;
City of Guthrie v. *Beamer*, 3 Okla. 652, 41 Pac. 647.

Where a settler on public land subsequently obtains a patent for the tract settled upon, such patent relates back as a conveyance of title to the inception of the right of the patentee.

Deffebacke v. *Hawke*, 115 U. S. 392;
Davis v. *Wiebold*, 139 U. S. 507.

So in the *Higgins* case the right to the patent ultimately obtained was originated by the occupation and staking of the Higgins homestead on April 22, 1889, and the subsequent attempted filing of a homestead entry thereon which was matured into a patent by successfully contesting all other claimants.

So in the *Noble* case the original occupant and claimant of the lot in question had a prior and superior right and title to all others except the United States, and this became a perfected fee title when the United States issued its patent to the townsite trustees and they in turn issued their trustees' deed to Naoma Noble.

It was conceded in the trial court and in the Supreme Court below that unless the Railway Company's title to its claimed right of way through the Oklahoma City townsite vested instantly under the Act of Congress, then its title thereto was not prior and superior, but was junior and inferior, to the claims of the petitioners' predecessors in title. If the Railway Company's title was dependent upon the location of its right of way before vesting, then no valid location had been made at the time of the Opening.

Third Proposition.

The title which the Choctaw Coal & Railway Co. was authorized under the Act of Congress, whether a grant *in præsenti* or not, to take in the land constituting its right of way, was a railroad easement or limited fee for railroad purposes, with the underlying fee or reversionary right in the land so taken in the Indian Tribe from which taken, and in the United States after the land was ceded to it by the Indian Tribe and became a part of the public domain, and in the settler or homesteader when the land was patented to him by the United States.

The title which a railroad company takes to its right of way is a peculiar estate. It is an estate in land unknown to the common law and confusion has resulted by designating it with the name of a common law estate and assuming that it carried with it the attributes and characteristics of the common law estate with the name of which it was labelled. It has been most generally termed an easement, yet it is more than the common law easement of way. In United States courts it was formerly termed an easement, *Smith* v. *Townsend,* 148 U. S. 490, but it is now held to be a fee upon limitation similar to, though perhaps not precisely the same as, the common law base, qualified or determinable fee.

In *New Mexico* v. *United States Trust Company,* 172 U. S. 171, 183, there is a comprehensive discussion of the nature of a railroad right of way. It is there pointed out that the term "right of way" has a twofold significance. Sometimes it is used to mean the mere intangible right of passage over a tract of land, and at others to describe the strip of land itself upon which railroad companies build their tracks. The Court there concludes with respect to the character of estate in the strip of land itself as follows:

> "But, if it may not be insisted that the fee was granted, surely more than an ordinary easement was granted—one having the attributes of the fee, perpetuity and exclusive use and possession; also the remedies of the fee, and, like it, corporeal, not incorporeal property."

In *Rio Grande Western Ry. Co.* v. *Stringham,* 239 U. S. 44, the Court in reference to the grant of a right of way by Congress said:

> "A right of way granted by this and similar acts is neither a mere easement, nor a fee simple absolute, but a limited fee, made on an implied condition of reversion in the event that the company ceases to use or re-

> tain the land for the purposes for which it is granted, and carries with it the incidents and remedies usually attending the fee."

In *Roxana Petroleum Corporation* v. *Jarvis,* 127 Kans. 365, 273 Pac. 661, 666, the court says:

> "While the term 'easement' does not accurately describe the interest, the term is precise enough when the purpose is to discriminate the interest in a general way from the totality of rights, privileges, powers, and immunities which constitute complete ownership. So considered, the phrase 'right of way' means an easement."

The petitioners contend that, even if conceivably the Choctaw Railway Act could be construed as a grant of title *in præsenti,* still there was an underlying estate in the land subject to the railroad's right of way, and that this servient estate would be an underlying fee, if the railroad's dominant estate was an easement, or a right of reverter, if the railroad's dominant estate was a limited fee, and that this servient estate was alienable and passed by patent, deed, will or inheritance just as any other interest in land would pass, and that it did pass by patent from the United States and by inheritance from the patentee to the petitioners.

In the oft cited case of *St. Joseph & Denver C. R. Co.* v. *Baldwin,* 103 U. S. 426, the Court by clear implication holds that, even where there is an absolute grant *in præsenti* of title to a railroad right of way through the public domain, the estate underlying such right of way remains in the United States, and the land remains part of the public domain subject to such right of way, and a homesteader and patentee from the United States across whose homestead the railroad has been or may thereafter be located acquires and owns this underlying estate subject to the incumbrance of the railroad right of way. Of the grant in that case the Court said:

> "The language of the Act here, and of nearly all the Congressional Acts granting lands, is in terms of a grant *in præsenti*. The Act is a perfect grant * * * 'There is hereby granted,' are the words used, and they import an immediate transfer of interest, so that when the route is definitely fixed the title attaches from the date of the Act."

In the statement of the facts and the contentions of the parties it is said:

> "When the grant of Congress was made, the land claimed by the plaintiff was vacant and unoccupied land of the United States. But the line of the road over it was not definitely located until October, 1871. He acquired whatever rights he possesses in October, 1869. The defendant contends that the plaintiff took *the land subject to its right of way*. He contends that the grant of the right of way took effect only from the date at which the company filed its maps designating the route with the Secretary of the Interior. The District Court of the State agreed with him and gave judgment in his favor. The Supreme Court affirmed it, and to review it the cause is brought here." (Italics supplied.)

The contentions stated did not involve the underlying estate, but only whether the railroad company had prior right and title to a right of way over the plaintiffs' title, or whether it would be required to recognize his title as superior and acquire a right of way by purchase or condemnation. The question was whether he took his title *subject* to or free from the railroad right of way. The Court did not hold that the land within the boundaries of the right of way was wholly withdrawn and severed from the public domain and could not be conveyed by the United States to a patentee, but did hold that the patentee would take *subject to* the right of way. The Court said:

> "We are of the opinion, therefore, that all persons acquiring any portion of the public lands, after the

passage of the Act in question, *took the same subject to the right of way* conferred by it for the proposed road.''. (Italics supplied.)

So the very case on which the lower courts' decision in these cases ultimately rests negatives the contention that no title to the land within the boundaries of a railroad right of way under a grant *in præsenti* would pass by Government patent to a homesteader, but on the contrary clearly indicates that the full title to the entire tract covered by the patent would pass thereby, but *subject* to the easement or limited fee of the railroad right of way.

In *Smith* v. *Townsend,* 148 U. S. 490, the facts were that Smith was a section hand living on the Santa Fe right-of-way and depot grounds at Edmond, Oklahoma, at and prior to April 22, 1889. At 12 o'clock noon on that day he left the right-of-way and went upon a nearby quarter section and settled on it as a homestead. His right to file on it was denied on the ground that he was within the Oklahoma country prior to the opening and was thereby disqualified. He brought suit, alleging that he had resided on the railroad right-of-way and depot grounds, and that these were not part of the public domain thrown open to settlement, but were excluded therefrom by reason of their having been taken, appropriated and set apart for railroad uses, and that, therefore, since he had never been off these excluded lands prior to the opening, he was not disqualified as a homesteader on the ground of having previously been within the territory opened to settlement. The Supreme Court held against him and held that the railroad right-of-way and depot grounds were included in the public domain thrown open to settlement by the Act of Congress and the President's Proclamation. In the opinion, Justice Brewer, speaking for the Court, reviews the legislation pertaining to the subject, and then says:

"Construing the statute in the light of these observations, it will be noticed, first, that the provisions apply to the land collectively. The prohibition is against entering upon 'any part of said lands,' meaning thereby the whole body of lands, and in this body was included the right-of-way of the railroad company. The company had simply an easement, not a fee in the land * * *. In other words, the entire body of lands still remained Indian lands—the fee continued in the Indians, and all that the company received was a mere right-of-way. So, when the treaty of cession was made between the Creek Nation of Indians and the government it was a cession of all lands lying west of a certain line, with no exceptions; and it was this body of lands which was declared by the Act of March 1, 1889, to be a part of the public domain, and thereafter subject to homestead entries; and the proclamation of the President, naming the exact hour at which the lands should be open to settlement, describes a body of land by metes and bounds and makes no exception of the railroad right of way, though it does of two acres, specially described and reserved for governmental use and control. *Doubtless whoever obtained title from the government to any quarter section of land through which ran this right of way would acquire a fee to the whole tract, subject to the easement of the company; and if ever the use of that right of way was abandoned by the railroad company, the easement would cease, and the full title to that right of way would vest in the patentee of the land.*" (Italics supplied.)

So here doubtless whoever obtained title from the Government to any land through which ran the Choctaw Railway right of way, whether before or after the location and construction of the road, would acquire a fee to the whole tract

"subject to the easement of the company; and if ever the use of that right of way was abandoned by the rail-

> road company, the easement would cease, and the full title to that right of way would vest in the patentee of the land."

The foregoing case arose in Oklahoma County in what had been the western half of the Creek Domain, and the right of way involved had been taken under the Act of Congress of July 4, 1884, 23 Stat. 73, authorizing the Southern Kansas Railway Co. to build a railroad through the Indian Territory south from the Kansas line. This is the same Act that is set out and construed in *Cherokee Nation* v. *United States*, cited and quoted *supra*. It is essentially the same as the Choctaw Railway Act.

In *Denver & R. G. R. Co.* v. *Mills*, 222 Fed. 481, the Eighth Circuit Court of Appeals had before it the precise question here considered of the effect of the abandonment by the railroad of a right of way granted by Act of Congress through the public domain, assuming for argument only that the Choctaw Act was such a grant. In that case the court said:

> "By act approved June 8, 1872, Congress granted to said railway company and its successors and assigns 'the right of way through the public domain one hundred feet in width on each side of the track,' together with certain adjacent lands, and also certain privileges similar to those granted to the Union Pacific Railroad Company."

The facts were that the railroad company built its road across a 320 acre tract later patented to the plaintiff or his predecessor in title. Years afterward it abandoned this part of its road and built a cutoff on a more direct or desirable location. Later it desired to use again the old right of way and denied that it had abandoned the same, but this question of fact was decided against it. Then the court had for consideration the question to whom the title to the

old right of way reverted upon such abandonment. In passing on this the court said:

> "Since there was an abandonment, the question arises to whom did the right of way revert? The original entries were made *subject to* the right of way. The patents were issued for the entire tract, but did not include the right of way so long as it was used for the purpose contemplated by the grant. *In the face of the patents, it cannot be said that the title reverted to the United States.* The estate of the railroad company was, to use the language of the *Townsend case,* 'a limited fee.' *Upon the extinction of that title by abandonment it was merged in the title held by those holding under the patentees.*" (Italics supplied.)

So here petitioners contend that when the railroad companies abandoned their right of way through Oklahoma City, "in the face of the patents, it cannot be said that the title reverted to the United States," but it must be said that upon such abandonment the whole title "was merged in the title held by those holding under the patentees."

In *Crandall* v. *Goss,* 30 Ida. 661, 167 Pac. 1025, the facts were quite similar to the case at bar. The Northern Pacific Railway Company had given a deed to its right of way and abandoned it and taken up and removed its rails, ties and all of its property therefrom. The homesteader and patentee of the land through which the right of way ran sued the railroad company's grantee to quiet title to the right of way strip. The railroad company's title had been derived from the Northern Pacific Congressional grant which was a grant *in praesenti.* The following cases, which are among those the city here relies on, were there cited in support of the contention that the homesteader took no title to the right of way by his patent:

Northern Pacific Ry. Co. v. *Townsend,* 190 U. S. 267, 23 Sup. Ct. 671, 47 L. Ed. 1044;

Holland v. *Northern Pacific Ry. Co.*, 214 Fed. 920, 131 C. C. A. 216;

Northern Pacific Ry. Co. v. *Concannon*, 239 U. S. 382, 36 Sup. Ct. 156, 60 L. Ed. 342.

Commenting on these cases the Idaho court said:

> "*Neither of the cases cited goes to the extent of holding that where, as in this case, the railroad company has abandoned a portion of its right of way, by removal of its tracks and all other railroad property therefrom and by ceasing to use it for the purpose for which it was granted, subsequent to its sale of the tract of land across which that right of way was situated, the reverter would be to the United States instead of to the owner of the servient fee.*
>
> "Upon consideration of the object of the grant, which was to procure to be built, maintained, and operated a transcontinental line of railroad, and not that there be reserved to the United States title to such isolated sections of the original right of way as might be abandoned by changes in the line of road, presumably with the consent of the United States, and which could serve no useful governmental purpose, we are strongly persuaded that it was the intention of Congress that upon the abandonment of such portions as might, from time to time, be found no longer useful for railroad purposes, by reason of changes in the location of the tracks, *title thereto should vest in the owner of the servient fee.*" (Italics supplied.)

The rule stated in this case is precisely the petitioners' contention here, assuming, contrary to the fact, that the Choctaw Company had a grant *in praesenti* of title to a right of way through the public domain, as the Northern Pacific had there. The court considers and rejects the proposition that the reverter in case of abandonment of the right of way "would be to the United States instead of to the

owner of the servient fee." Upon the same reasoning the respondent's contention should be rejected here.

In addition to the foregoing cases we cite the following:

Rio Grande Western Railway Co. v. *Stringham*, 239 U. S. 44;

Oregon Short Line v. *Stalker*, 14 Idaho 362, 94 Pac. 56;

Hurst v. *Idaho-Iowa Lateral Canal Co.*, 34 Ida. 342, 202 Pac. 1068-1070;

Bowman v. *McGoldrick*, 38 Ida. 30, 219 Pac. 1063.

The position of the Land Office is expressed in the following taken from its Regulations Concerning Railroad Right of Way Over the Public Lands, 32 Land Office Dec. 481, 482:

> "The Act of March 3, 1875, is not in the nature of a grant of lands; but it is a base or qualified fee, giving the possession and right of use of the land for the purpose contemplated by the law, a reversionary interest remaining in the United States, to be conveyed by it to the person to whom the land may be patented, whose rights will be subject to those of the grantee of the right of way".

In the case of railroad rights of way in Oklahoma across Indian lands it is held by the Land Office that the railroads have no right to oil or gas from the right of way area. The ownership of these minerals is in the owner of the reversionary estate or title.

Missouri, Kansas & Texas Ry. Co., 33 Land Office Dec. 470;

Missouri, Kansas & Texas Ry. Co., 34 Land Office Dec. 504.

Fourth Proposition.

The provisions of the Choctaw Railway Act were inoperative in the public domain, or if operative therein were not

exclusive and mandatory, but the Railway Company could decline to take its right of way under that Act and could acquire a right of way by purchase or condemnation of lands of settlers and homesteaders, if it chose, and in these cases it did, in compromise settlement of a substantial *bona fide* legal controversy and for a valuable consideration, in fact abandon its claim to a right of way under the Act across the land here involved, and did in fact acquire such right of way by purchase from individual owners to whom the full fee simple title had been conveyed by the United States, and did in fact take title to such right of way by deed containing the express provision that upon abandonment of the land for railroad purposes the full title thereto should revert to the grantors, their heirs and assigns, whereby it estopped itself to deny its grantors' title, or to claim title thereto derived from any other source, and bound itself to recognize and maintain its grantors' title.

Under this proposition petitioners claim that, if it be assumed for the purpose of argument only that the Choctaw Act is a grant of a right of way *in praesenti* and that a patent from the United States conveys no title to the land within the boundaries of the right of way underlying the railroad title to the surface, still the Company's title to the right of way involved in the instant cases was not acquired under the Act of Congress, but by purchase and voluntary conveyance from petitioners' ancestors, and that the assumed grant under the Act of Congress was not compulsory and exclusive, but the company had the right to decline to take title under its provisions to a right of way through Oklahoma Territory after the land therein became subject to private ownership, and might, if it chose, acquire such title by purchase and conveyance from a private owner.

This proposition presents questions both of fact and of law, but on the facts there is no dispute. The company

did in fact, under an agreement to do so and for a valuable and sufficient consideration fully paid, abandon and surrender the proposed location of its road through Oklahoma City under the Act of Congress and did in fact take title to the right of way on which the road was actually constructed by deeds of conveyance from private owners whose title rested on a patent from the United States.

It will be recalled that the line of the road on the original survey and map of location cut diagonally for a very short distance across the northeast corner of the Higgins land. Some two years later this location was moved approximately 600 feet further south in line with the alley between First and Second Streets in the townsite, whence it extended westerly 100 feet wide entirely across the quarter section. Title at this changed location was conveyed by the right of way deed of Higgins and wife for the recited consideration of $400 paid by the company.

Each of these deeds was a bilateral contract by which the company, in consideration of and as a condition of the conveyance, contracted and agreed that, upon the abandonment of the premises conveyed for railroad purposes, they should revert to the grantors, their heirs or assigns. So far as the company and those claiming under it are concerned, this is conclusive evidence that it took title under such deeds and not under the Act of Congress. Upon abandonment of the right of way it is estopped and conclusively bound by this contract, and could not convey any title to anyone else for any other than a railroad purpose, and could not deny the validity of the grantors' title at the time of the execution of the deed. The principle is the same as that by which a tenant is estopped to deny his landlord's title.

Cowell v. *Colorado Springs Co.*, 100 U. S. (10 Otto) 55, 25 L. Ed. 547;

Robertson v. *Pickrell*, 109 U. S. 603, 27 L. Ed. 1049, 3 Sup. Ct. 407;

Stevens v. *Galveston, H. & S. H. Ry. Co.* (Tex. Civ. App.) 169 S. W. 644, 656.

In *Cowell* v. *Colorado Springs Co., supra,* certain premises were conveyed to Cowell by the Colorado Springs Co. with a provision in the deed that upon a certain contingency the title should revert to the grantor. The contingency happened and the grantor brought suit to recover the premises. Cowell defended on the ground that the grantor did not have title to the premises at the time they were conveyed and also denied its corporate existence. The Court in passing on these defenses said:

> "The defendant, as already stated, went into possession of the premises in controversy under the deed of the plaintiff. He took his title from the company, with a condition that if he manufactured or sold intoxicating liquors, to be used as a beverage, at any place of public resort on the premises, the title should revert to his grantor; and he is, therefore, estopped, when sued by the grantor for the premises, upon breach of the condition, from denying the corporate existence of the plaintiff, or the validity of the title conveyed by its deed. Upon obvious principles, he cannot be permitted to retain the property which he received upon condition that it should be restored to his grantor on a certain contingency, by denying, when the contingency has happened, that his grantor ever had any right to it." (Citing cases.)

In *Stevens* v. *Galveston, H. & S. H. Ry. Co., supra,* both *Cowell* v. *Colorado Springs Co.* and *Robertson* v. *Pickrell* are quoted at length with approval, and numerous other authorities are cited.

In the instant cases the alleged grant of a right of way was never availed of by the Railway Company insofar as

the land here involved is concerned. Before it had built or even started construction of its road through Oklahoma City it voluntarily and for a consideration and by agreement made to settle a *bona fide* legal controversy abandoned its supposedly granted right of way, and took title to the right of way where it did actually construct its road by purchase and conveyance from individual owners. It seems unreasonable that Congress intended that the Choctaw Railway Act, if ever it could be applied to land of the public domain, should be construed as a mandatory requirement that the company take a right of way under its provisions and in no other way, even though some other way might be more to the advantage of the company.

It should be noted in this connection that the right of way transaction in question took place in 1891 when Oklahoma was a Territory of the United States; that the rights of the parties were fixed by the law as it then existed; and that it is the province and within the jurisdiction of the Supreme Court of the United States, as the highest court of review for Oklahoma Territory, to declare the law as it existed therein in 1891 on this subject, as well as all others, without being bound by decisions of the Supreme Court of the State of Oklahoma, even though the transaction does not present what would be termed a federal question if it had taken place in one of the States of the United States.

Fifth Proposition.

The City of Oklahoma City acquired no title or right to the abandoned right of way of the railroad company under the Act of March 8, 1922, 42 Stat. 414, providing for the disposition of abandoned or forfeited railroad rights of way granted through public lands, and if that Act be construed to grant the right of way here involved to said City then it is violative of the Fifth Amendment to the Constitution of the United States.

The Oklahoma Supreme Court holds that the above Act operates as a conveyance of the abandoned railroad right of way here involved to the City of Oklahoma City. The full text of this Act appears in the record at page 87. Plainly it could have no effect upon this land unless the title thereto upon its abandonment for railroad purposes reverted to the United States instead of to the petitioners. But even so petitioners still contend that it does not operate to grant and convey such land to the City, and particularly is this true with respect to the Higgins land.

The Act does not constitute a grant to the municipality. The gist of it is that whenever public lands of the United States have been granted to a railroad company and have thereafter been abandoned for railroad use, then all right of the United States therein shall be transferred and vested in the person to whom the United States may have patented the legal subdivision traversed by a railroad right of way, except where such right of way is within a municipality, when it shall vest in the municipality, "and this by virtue of the patent thereto and without the necessity of any other or further conveyance." The plain intent of this statute is that in any proper case, where the United States retains ownership of the fee of land over which a railroad right of way has been granted, the title to such right of way in case of abandonment for railroad use is conveyed to the patentee or those claiming under him, whether private person, corporation or municipality.

Under the townsite acts a municipality is always the patentee, either directly or through some official or board as trustee. The term "municipality," as used in the Act means the municipality which received a townsite patent, for the abandoned railroad right of way is to go to the municipality "by virtue of the patent thereto". Neither the city of Oklahoma City, nor its Board of Townsite Trustees, was ever a patentee of the Higgins land, so the only

person to whom the title could pass "by virtue of the patent" was the original patentee or those claiming under him. A careful analysis, which we do not here stop to make, of the grammatical structure of the statute sustains our position. For example, in the phrase "without the necessity of any other or further conveyance or assurance of any kind", the words "other or further" can only refer to the original patent, and that can operate to convey only to the original patentee or his suecessors in title.

In respect of the Noble land, a patent including it was issued to a Board of Townsite Trustees, not in trust for a municipality, but in trust for the occupants of lots within the described area (R. 6). So that whatever title to the abandoned railroad right of way across the Noble lot would pass "by virtue of the patent" would pass in trust for the ancestor of the petitioners Noble.

We cite the case of *James A. Power et al.*, 50 Land Off. Dec. 392, which construes the Act in question.

Attention is also called to the Acts of Congress of 1906 and 1909, which are now found in Section 940, Title 43, U. S. Code, which is as follows:

> "Forfeiture of Rights Where Railroad Not Constructed in Five Years After Location.
>
> "Each and every grant of right-of-way and station grounds made prior to February 25, 1909, to any railroad corporation under the six preceding sections, where such railroad had not been constructed and the period of five years next following the location of said road, or any section thereof, had on that date expired, is declared forfeited to the United States to the extent of any portion of such located line then remaining unconstructed, and the United States resumes the full title to the lands covered thereby free and discharged from such easement, and the forfeiture declared shall, without need of further assurance or conveyance, inure to

> the benefit of any owner or owners of land conveyed by the United States prior to such date subject to any such grant of right-of-way or station grounds."

There would seem to be no reason for distinction in the disposition of a right-of-way between a case where the railroad right was forfeited for failure to construct a road within five years and one where it was forfeited by abandonment for railroad purposes after having been used for a period of years. The two Acts of Congress seem to have the same object and intention and are strikingly similar in language. In both the lands freed from the railroad "easement" are to go by "virtue of the patent" and without further assurance or conveyance to the owner or owners of the land previously conveyed by the United States subject to the granted right-of-way.

If the patents from the United States conveyed to the patentee any title to the land therein described subject to a railroad right-of-way across the same, then any attempt of Congress to convey by legislative enactment that title to another is in contravention of the Fifth Amendment to the Constitution and void.

Conclusion.

Petitioners fully realize that these cases involve no question of Government policy or general public interest. They do involve a substantial property right of the petitioners. They will establish a precedent for the determination of property rights of large value for a considerable number of other persons.

Petitioners believe that the decision of the Oklahoma Supreme Court is flagrantly erroneous in that it takes away their property rights which were fixed and established by Acts of Congress and judicial interpretation of them by this Court more than forty years ago, and in the teeth of

such statute and the decisions of this Court gives those rights to the respondent in these cases. They believe that this High Court is as jealous of protecting the personal rights and property rights of the humblest citizen when these come within its jurisdiction, as it is in determining questions of governmental policy or defining and limiting congressional and executive powers in the enactment and administration of law, or determining any other question of the widest public interest.

So believing, Petitioners confidently ask of this Court that the writs of certiorari prayed for in these cases be granted and that upon the hearing of the cases on the merits the errors committed by the Supreme Court of the State of Oklahoma be corrected.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1935.

NO. 335

GEORGE NOBLE and WILLIAM NOBLE,
Petitioners,

VERSUS

THE CITY OF OKLAHOMA CITY,
a Municipal Corporation,

NO. 336

ROBERT W. HIGGINS, JR., JOHN T. HIGGINS,
RALEIGH E. HIGGINS ET AL.,
Petitioners,

VERSUS

THE CITY OF OKLAHOMA CITY,
a Municipal Corporation,

REPLY BRIEF OF PETITIONERS

JOE T. ROGERS,
HENRY L. GODDARD,
WARREN E. LIBBY,
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The Cases Are Not Decided on a State Question

Because of the unforeseen contention raised by respondent that the decision of the Oklahoma Supreme Court in the *Higgins* case could and should have been based on a question of state law only and therefore certiorari ought not to be granted in that case, the petitioners deem it desirable to file a reply brief.

Petitioners do not dispute the statement of the law on this point by respondent. They agree that where a state court decides a case upon a non-federal question which is decisive of the whole case, then its decision on a federal

question in the same case will not be reviewed by this Court, regardless of whether such decision is right or wrong. When the non-federal question decided in the case is broad enough to sustain the court's decision, then this Court will not be concerned as to how any federal question involved may have been decided.

Respondent contends that the so-called right of way deed in the *Higgins* case (R. 152 fl.) conveyed a title in fee simple absolute to the described land to the Choctaw, Oklahoma & Gulf Ry. Co., grantee therein, which title was conveyed by the railway companies' deed to the respondent (R. 177), and that the Oklahoma Court would have so held, if it had passed on the character of title conveyed by that instrument, and that it would have passed on that point, if it had not decided the case adversely to the petitioners on other grounds.

An examination of the pleadings in the case shows that the respondent specifically denied the execution of the right of way deed from Higgins to the railroad company and specifically denied that Higgins had any title to convey by that deed. The answer says:

> "4. Defendant has no knowledge as to whether or not the said Robert W. Higgins, Sr., by the name and style of Robert W. Higgins and Susan A. Higgins, his wife, made, executed and delivered to the Choctaw Coal and Railway Company the alleged right of way deed and release of damages described in paragraph four of plaintiff's petition, a copy of which is set forth as Exhibit 'B' thereto, and defendant therefore specifically denies that such a deed was executed and delivered, and defendant further specifically denies that

the said Robert W. Higgins, Sr., at the time of the execution and delivery of said alleged deed was the owner of the fee simple title to the land described and set forth in said alleged right of way deed and release of damages. But defendant avers that if such a deed was executed and delivered, which is not admitted but is hereby expressly denied, neither the plaintiff nor his wife, Susan A. Higgins, by reason of the facts aforesaid, had any right, title, interest or estate, to or in said land at the time of the execution and delivery of said alleged quit claim deed and release of damages and that plaintiff now has no right, title or interest in or to said land or any valid claim thereto" (R. 156).

Respondent now says that the state courts should have held that Higgins by that deed conveyed a title in fee simple absolute.

Again, the answer says:

"6. Defendant admits that when the railroad companies discontinued the use and occupation of said land as and for a right of way and for railroad purposes, their title thereto was defeated and terminated, upon a decree being entered in the United States District Court in and for the Western District of the State of Oklahoma, finding, holding and declaring that such railroad companies had so abandoned said property" (R. 160).

Respondent now says that the state courts should have held that by the Higgins deed the railroad company took a title in fee simple absolute which was conveyed by its deed (R. 177) to respondent. Plainly, if it took such title by the Higgins deed, then under the decisions in the other Oklahoma cases on which respondent relies, its title could not

have been, and so was not, "defeated and terminated" by abandonment of the land and the decree of the United States District Court (R. 37-40).

In its judgment the trial court makes a general finding of the issues for the defendant (respondent) and then the following holding upon the law:

> "The Court holds, as a matter of law, that the Act of Congress of February 18, 1888 (25 Stats. 35) together with the Acts amendatory thereof, was a present absolute grant of the land described in the petition herein for right of way and station grounds to the Choctaw Coal and Railway Company, vesting the fee title to said land in said Company immediately upon the enactment and approval of said Act, with a possibility of reverter in the United States, and that the patent purporting to convey to R. W. Higgins the whole of the Southwest Quarter of Section Thirty-three (33), in Township Twelve (12) North, Range Three (3) West of the Indian Meridian, was ineffective to convey to said R. W. Higgins any title to the land within the boundaries of the right of way of said Company across said quarter section as and when located and that, therefore, the said right of way having been located in conformity to said Act, so as to include all the land involved in this action, neither the plaintiffs, nor any persons through whom they claim to have derived title under said patent, now have, or have ever had, any sort of right or title whatsoever to said land.
>
> "The Court holds further, as a matter of law, that the land included within the boundary lines of said right of way, as the same should thereafter be and was thereafter located, was, by the Act of Congress aforesaid, appropriated to a lawful use and thereby severed from the public domain of the United States, and was never thereafter subject to preemption, home-

stead or townsite entry, and that the Land Department of the United States had no authority, after the enactment of said Act, to grant any title to said land to any person.

"The Court further holds, as a matter of law, that upon abandonment for railway purposes of said land within the boundaries of said right of way and station grounds, title to said land revested in the United States, and upon entry of the decree of the United States District Court for the Western District of Oklahoma finding such abandonment, that the title to said land immediately vested in the City of Oklahoma City, a municipal corporation, by virtue of the Act of Congress of March 8, 1922 (42 Stats. 414)" (R. 187 fl.)

The judgment follows the finding and the holding on the law. It is plain that the judgment of the trial court is not based on any question of state law, but is based exclusively and solely on federal questions.

An examination of the decision of the State Court in these cases shows that it is not based on any state or non-federal question, but is based squarely and solely on the interpretation and application of various Acts of Congress.

This appears from the following excerpts from the decision in which the questions presented and the holding thereon are stated:

"At the very threshold we are confronted with the nature of the right, privilege, or estate granted by the above-quoted act to the Choctaw Coal & Railway Company, it being contended by defendant that a right of way in the nature of a base or determinable fee, with possibility of reverter in case of nonuser, was granted by said act. But plaintiffs contend that only a fran-

chise was granted to said railway company to acquire a right of way over said lands, and that Congress was without authority to grant more than a mere right to exercise the sovereign power of eminent domain for the reason that at the time of the passage of said act said lands belonged to the Creek Tribe of Indians, or at least that the Creek Tribe of Indians had an interest therein, which Congress was without authority to impair (R. 202).

* * * * * * * *

"With all of the congressional recognition of the rights of the railroad company, both prior and subsequent to the attachment of any rights of plaintiffs, it is clear that plaintiffs, after the lapse of 40 years, cannot claim a want of title in the United States to defeat whatever rights were granted, recognized, and acquiesced in by the Congress, the public, and the predecessors in title of the plaintiffs (204).

* * * * * * * *

"It is conceded that upon abandonment by the railroad company its title terminated. We must determine, however, whether or not the reverter inured to the United States or passed by the government patent issued to plaintiff's predecessors (R. 210).

* * * * * * * *

"It is contended by plaintiffs, however, that the railroad company abandoned a portion of its right of way as granted by Congress under the Act of 1888, and substituted in lieu thereof a purchased right of way over lands of plaintiffs' predecessors, and that having accepted right of way deeds from plaintiffs' predecessors, the railroad company and its successors in title, the city, are estopped from asserting an adverse title to the title of plaintiffs" (R. 216).

* * * * * * * *

"Plaintiffs contend, however, that by the acceptance of the deeds hereinabove mentioned, the railroad company, and its successors in interest, the city are estopped from denying the title of plaintiff's predecessors to the tracts of land in controversy. This claim of plaintiffs overlooks, however, that the title of the railroad company was extinguished by abandonment and that the right of reverter inured to the benefit of the United States and that by Act of Congress dated March 8, 1922 (42 Stats. 414), the United States invested in the city the title to said property by specific grant for certain purposes as set forth in said act. There can be no estoppel as against the United States arising by reason of the individual acts or contracts of individuals. The title of the city is deraigned from the government and not from the railroad company, nor from the predecessors of plaintiffs.

"The reversion clause in the Noble deed purported to contract with reference to a right retained by the United States government, and was therefore wholly ineffective. We point out also that in the Higgins deed the deed expressly recognized the rights of the company under the Act of 1888, and subsequent acts, which right we have determined hereinabove to be superior to the claims of the Higgins heirs. We conclude that upon abandonment by the railroad company, and the judicial determination thereof, as hereinabove set forth, the city became invested with the title to the tracts of land in controversy subject to the provisions of Congress by the Act of March 8, 1922 (42 Stats. 414)" (R. 221).

It is plain the Oklahoma Supreme Court did not recognize any question of state law involved in the cases. It did not consider or decide any such question, but based its decision squarely and solely on federal questions. If it could

be said that a construction of the Higgins right of way deed necessarily inheres in a decision of the case, then the decision of the Court on that question is adverse to respondent and could not possibly be considered a ground of decision in respondent's favor. So respondent must fall back on the claim that the Court would have decided that question differently if it had not decided in respondent's favor on the federal questions.

Surely respondent may not thus speculate on what the court might or would have done, but did not. And in any event the fact is that the court did, without discussion but in clear and definite language, hold that the railroad company acquired no title under the Higgins deed which it could transmit by deed upon abandonment of the land for railroad purposes. The court says (R. 210), as quoted above, that "upon abandonment by the railroad company its title terminated" and the resulting question was as to whom the reverter inured, and again (R. 221) that "the title of the railroad company was extinguished by abandonment", and again that (R. 221) "the title of the City is deraigned from the Government and not from the railroad company, nor from the predecessors of plaintiffs."

Respondent says that this Court ought to examine the decisions of the Oklahoma Court in the cases of *Marland* v. *Gillespie*, 168 Okla. 376, 33 Pac. (2d) 207, and *Oklahoma City* v. *Dobbins*, — Okla —, 44 Pac. (2d) 148, and from such examination reach the conclusion that it ought to have held in these cases that the right of way deed from the Higgins' ancestor conveyed a fee title to the railroad

company. Now if this Court should examine the *Marland* case, it will find that the instrument there under consideration was a complete statutory warranty deed, but containing a recital that the land conveyed was for right of way for a railroad track. The questions decided were whether a railroad company had capacity to take a fee title to a right of way under the laws of Oklahoma, and whether that deed conveyed a fee title. Both questions were answered in the affirmative, with Justice McNeill rendering a long and vigorous dissenting opinion. In previous decisions the Court had held that a railroad company had no capacity to take, and could not by any sort of conveyance take, any title to a right of way other than a right to the surface for railroad purposes with an implied reverter to the grantor or those claiming under him in event the land was abandoned for such purposes. These cases were expressly overruled in the *Marland* case. Then it was further held that the mere recital in the warranty deed of the purpose for which the land was to be used was not a limitation or restriction on the quality of title conveyed.

In the *Dobbins* case the instrument under consideration was the plainest, simplest form of warranty deed. There is nothing in it to suggest a railroad use except such inference as might be drawn from the name of the grantee. There the Court followed the *Marland* case without discussion and again held that under Oklahoma law a railroad corporation has the capacity to take a fee title to land for railroad purposes. In respect of the effect of the deed, the Court said:

> "The controversial issue as to the rules of law relating to a fee simple and a right of way are not presented by the record in this case, for the deed on its face purports to grant a fee-simple title, with no words of limitation. The conveyance was voluntary. The only question involved herein is whether or not there was authority in the company to acquire such title."

Thus it appears that there is nothing in either of those cases to indicate that the Oklahoma Court, if it had considered that there was a controversial issue as to the character of title which the Higgins deed conveyed and had decided such issue, would have reached the conclusion that it conveyed a fee simple title. On the contrary, as shown in the matter quoted above, the Court repeatedly and emphatically stated that the railroad title was extinguished by abandonment and that the respondent deraigned its title from the United States, and not from the railroad company, nor from petitioners predecessor in title.

The Court apparently assumed it was so obvious the Higgins deed conveyed nothing but an easement for railroad purposes that no one would have the hardihood to contend to the contrary, and that it was sufficient without elaborate discussion of the subject simply to state that whatever title the railroad company got by that deed terminated when the land was abandoned for railroad use. This holding stands out the more clearly in contrast with its contemporaneous holding in the *Marland* and the *Dobbins* cases.

Reply to Some Statements in Respondent's Brief

The foregoing covers the chief reason for this reply brief. But since they are filing a reply brief, petitioners desire to refer to a few statements in respondent's brief which should not pass unchallenged. The pages given below are where the matter referred to appears in respondent's brief.

At page 4:

Respondent quotes a part of the first sentence of Article 20 of the Treaty with the Creeks and Seminoles of August 7, 1856, 11 Stat. 699. This sentence in full is as follows:

> "Article 20. The United States, or any incorporated company, shall have the right of way for railroads, or lines of telegraphs, through the Creek and Seminole countries; but in the case of any incorporated company, it shall have such right of way only upon such terms, and payment of such amount to the Creeks and Seminoles, as the case may be, as may be agreed upon between it and the national council thereof; or, in case of disagreement by making full compensation, not only to individual parties injured, but also to the tribe for the right of way, all damage and injury done to be ascertained and determined in such manner as the President of the United States shall direct."

It is plain that the United States was not exercising the right given it by that Treaty to build a railroad through the Creek country when the Choctaw Railway Act was enacted. The Treaty provides that an incorporated company may have the right of way for a railroad upon

payment of an agreed price therefor, or in case of disagreement by a method of determination which would amount to condemnation proceedings. No authority is there given for the United States to grant a railroad company a right of way *in praesenti* through the Creek Country. On the contrary the only thing the United States is authorized to do is exactly what it did in the Choctaw Railway Act, which was to grant the railroad company a franchise to construct a railroad through the Indian country and to exercise the power of eminent domain to obtain title to a right of way, with an express reverter of the land taken whenever it was abandoned for railroad use.

At page 6:

Respondent charges that petitioners are in error in stating that it was conceded in the courts below that upon the abandonment of the land by the railroad company, it reverted either to the United States or to petitioners through their predecessors in title. In answer to this, petitioners refer to the language of the Oklahoma Supreme Court on this point quoted above. The Court there says that this precise thing is conceded.

At page 21:

Respondent cites *Mackey* v. *Choctaw, O, & G. R. Co.*, 261 Fed. 342, and says that the Court there spoke of the Choctaw Railway right of way as one "granted by Congress *in praesenti*". This is not a true quotation. The Court does not use any such language nor its equivalent. The expression "*in praesenti*" can not be found in the de-

cision or in the syllabus. The Court speaks of "the Congressional grant of the easement for railroad purposes", and of the "purposes for which Congress granted the railroad easement", and says that "the easement of the Choctaw, Oklahoma & Gulf Railroad Company * * * was granted in perpetuity."

Thus the right of way itself was regarded only as an easement. The question of the manner in which the railroad company acquired title, whether by purchase, grant or condemnation, was not before the Court and was not considered or decided. The only thing the Court was concerned with was the character of title which the railroad company held. The most casual reading of the opinion shows that all the Court meant in the expressions used was that the railroad company had acquired a title, either easement or limited fee, to its right of way under grant of authority from Congress. So far as any issue in the case was concerned, it was wholly immaterial whether that had been the grant of a title vesting *in praesenti* or the grant of a franchise to construct a railroad and of the power of eminent domain to condemn and acquire a right of way therefor.

At page 22:

Respondent cites the decision of the Supreme Court of the United States in the above case, *Choctaw, O. & G. R. Co.* v. *Mackey*, 256 U. S. 531, and quotes what is said to be the beginning of the second syllabus. We do not know who writes the syllabi for the decisions of the Supreme Court of the United States. We do know that the matter quoted

by respondent is not in the syllabus to the report of the case to which we have access. Nor is such language, or any similar language, to be found in the opinion of the Court itself. There, as in the Appeals Court, the question considered was the character of the railroad company's title and not the manner in which it was acquired.

The only reference to the manner of acquisition is where the Court says that the Choctaw, Oklahoma & Gulf:

> "Had, in locating its railroad through Holdenville, taken, besides the right of way 100 feet wide, an additional strip for station purposes 200 feet wide, with a length of 3,000 feet, having acquired the power so to do by succeeding to the powers and franchises of the Choctaw Coal & Railway Company. To that Company Congress had in 1888 granted the right to build a railroad in Indian Territory, with a branch line to coal mines leased from the Choctaw Nation."

There is no suggestion here that Congress had granted *in praesenti* a right of way and station grounds to the railroad company.

At page 30:

Respondent criticizes petitioners for saying it was conceded in the lower courts that unless the railway company's title to the involved right of way vested instantly under the Act of Congress, then such title was inferior to that of the petitioners' predecessors in title.

The decision of the Oklahoma Supreme Court seems sufficient authority for this statement. Besides its truth is so obvious that concession of it could properly be assumed.

If the Choctaw Railway Act did not grant a right of way *in praesenti*, then the railway company never did acquire title under that act, or if it did, then no title was acquired until the filing of its map of location on July 16, 1889. Long before that date the rights of petitioners' ancestors had attached to the land here involved.

The respondent emphasizes (Br., pp. 29, 51) the fact that the railroad company had surveyed a line of road and staked a right of way across the Oklahoma City townsite before it was opened to settlement. The law is well settled that surveying and staking a right of way of itself confers no sort of title or priority of right. If a railroad company had a right of way granted *in praesenti*, then no survey and staking was necessary to establish its title. If it did not have a grant of title *in praesenti*, then its right could be established either *(1)* by filing its map of definite location in the office of the Secretary of the Interior, or *(2)* by actual construction of its road, and in no other way. Surveying and staking a line for a road is not *actual construction* of the road. The following cases so hold:

Sioux City & I. F. Town Lot & Land Co. v. *Griffey*, 143 U. S. 32;

Jamestown N. R. Co. v. *Jones*, 177 U. S. 25;

Minneapolis, St. Paul & St. Me. R. Co. v. *Doughty*, 208 U. S. 251.

At page 32:

Respondent says that petitioners cite without comment the case of *Northern Pacific Railway Co.* v. *Townsend*, 190

U. S. 267, in support of their case. This statement is in error, for petitioners' reference to this case is merely that it was considered in *Crandall* v. *Goss,* 130 Ida. 1061, 167 Pac. 1025, in which the Idaho Court held that there was nothing in the *Townsend* case to require the reverter of the railroad right of way upon its abandonment for railroad purposes to the United States, instead of the owner of the servient fee, and that in such situation, notwithstanding the *Townsend* case, the title to the abandoned right of way would vest in the owner of the servient fee.

As pointed out in our original brief, the *Townsend* case did not deal with a situation where a railroad right of way was wholly abandoned for railroad purposes and the question of whom the land reverted to was presented for decision.

At page 38:

Respondent says the case of *Denver & R. G. Co.* v. *Stringham,* 239 U. S. 44, cited by petitioners, has no application to the instant cases. That case holds that the railroad title there involved was to the surface only for railroad purposes and that a mining claimant took the fee title to his mining claim underlying the railroad right of way and subject to the railroad use of the surface.

At page 40:

Respondent says in the case of *Denver & R. G. Co.* v. *Mills,* 222 Fed. 481, cited by petitioners, is not in point because decided on questions of Colorado law, and because the Government was not a party to it. The precise question

decided there was whether the title to the abandoned right of way reverted to the patentee where there was a grant *in praesenti* of the right of way across the land. The Court held that it did. Obviously, no Colorado law could control or affect the decision of this question.

At page 51:

Respondent says that, as to the land involved in the *Noble* case, the original survey of the line of road across the Oklahoma City townsite was never changed. A reference to the plat, Exhibit 13 (R. 90-B), shows that this survey was materially changed in respect of this land. The railroad company abandoned its claim of a right of way 100 feet wide with 200 feet additional for station grounds, and took a right of way 100 feet wide on a distinctly different line and location. Petitioners deem it immaterial whether the Noble land or any other land was or was not included in the original survey across the townsite. The change is material only on the question of the abandonment by the railroad of its originally located right of way. If the Choctaw Railway Act was a grant *in praesenti,* then title to the right of way vested in the railway company without any survey. If it was not a grant *in praesenti,* then probably no title ever vested in the railroad company under that Act, and if it did, then not until long after the ancestors of petitioners had occupied the land involved.

If the railroad company could not abandon its vested right of way, then the question of an abandonment between 1889 and 1901 disappears from these cases. If it could abandon its originally located line, the facts of the case,

including the fact of the change of the original survey, show that it did so. If it did not take a vested title *in praesenti*, then it can not be seriously disputed that it could abandon any surveyed or claimed right of way and acquire another one by purchase. Whether it could abandon a right of way granted *in praesenti* is a disputed question of law in the case.

CONCLUSION

In respect of the cases cited by petitioners in their "Reasons Relied on for the Allowance of the Writs" (Petition, pp. 14-17), as to the holding and application of which petitioners and respondent disagree, petitioners respectfully request that this Court re-examine these, if not already entirely familiar with them.

For the reasons and the grounds set forth in their original brief, petitioners assert that the instant cases are proper ones for the granting of certiorari to the State Court.

Respectfully submitted,

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JAN 20 1936

In the Supreme Court of the United States

OCTOBER TERM, 1935.

NO. 335

GEORGE NOBLE and WILLIAM NOBLE,
Petitioners,

VERSUS

THE CITY OF OKLAHOMA CITY,
a Municipal Corporation,
Respondent.

NO. 336

ROBERT W. HIGGINS, JR., JOHN T. HIGGINS,
RALEIGH E. HIGGINS ET AL.,
Petitioners,

VERSUS

THE CITY OF OKLAHOMA CITY,
a Municipal Corporation,
Respondent.

REPLY BRIEF OF PETITIONERS TO SUPPLEMENTAL BRIEF OF RESPONDENT.

JOE T. ROGERS,
HENRY L. GODDARD,
WARREN E. LIBBY,
R. L. DISNEY,
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THE CITY OF OKLAHOMA CITY,
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REPLY BRIEF OF PETITIONERS TO SUPPLEMENTAL BRIEF OF RESPONDENT.

Respondent having served petitioners' counsel with a supplemental brief, they deem it desirable to file a reply thereto.

At pages 2 to 8, inclusive, of this supplemental brief the following question is considered:

Was the Act of Congress termed the Choctaw Railway Act, as amended, a grant in praesenti of the right-of-way to the railway company?

In respondent's discussion of this question it is as-

sumed that petitioners' contention that the Act did not grant a right-of-way *in praesenti* is based solely on the proposition that the land to be traversed by the railway was land owned in fee by the Indians and hence Congress was *without power* to grant title to a right-of-way across it. No other argument is made in the pages of respondent's supplemental brief referred to.

In this respondent wholly misinterprets and misrepresents petitioners' contention. Their contention is that the Act of Congress does not by its very langauge purport or pretend to grant title to a right-of-way at all, but on the contrary purports to and does merely grant a franchise to construct a railway and the power of eminent domain to condemn and acquire a right-of-way therefor and that this interpretation of the Act is not only apparent from the language used, but has been the settled congressional, executive and judicial interpretation of it from the time the bill was introduced in Congress down to date. This contention is made plain, and is fully supported by authorities presented in petitioners' original brief.

But petitioners have urged and still urge, that since the original Act authorized a railway through Choctaw and Chickasaw country, the title to which was owned by these Tribes in fee, the interpretation of the Act as a present grant of title was not permissible because beyond the power of Congress. This is urged in support of the construction of the Act contended for by them, and not as a ground to defeat the provisions of the Act itself. In other words, it is not petitioners' position, as respondent represents it to be,

that the Act by appropriate language granted a right-of-way *in praesenti* but that the effect of such language was defeated by lack of constitutional power in Congress to make such a grant. Consequently respondent's argument that *Congress had the power to grant* a right-of-way *in praesenti* across the lands in question, even if correct, which petitioners deny, goes merely to the question of *the power of Congress* and not to the question of what Congress actually did and provided by the very language of the Act itself.

We deem it settled by the case of *Cherokee Nation* v. *Southern Kansas Ry. Co.*, 135 U. S. 641, that Congress was without power to grant a railroad right-of-way *in praesenti* through the lands of the Cherokee Nation, and hence also through the lands of any other of the Five Civilized Tribes who held the same sort of fee title to their lands as the Cherokees, and that being without power to make such grant, the original Act would be void if it purported to do so, because the line of road there authorized was wholly across lands of the Choctaw and Chickasaw Tribes to which they held a fee title, and the amendment to the Act would likewise be void in respect to at least that part of the line of road which traversed the eastern half of the domain of the Creek Tribe. It was and is urged by petitioners that this fact is a powerful argument, even though it be not needed, to support the interpretation of the Act contended for by them, and as announced in *United States* v. *Fort Smith & Western Ry. Co.*, 195 Fed. 211 (8th C. C. A.), and in the opinion of the Attorney General in 27 Land Office Decisions 417.

The United States had a restricted title to the western half of the Creek domain until March 1, 1889. This territory had been ceded to it by the Treaty of Washington, June 14, 1866, 14 Stat. 785, for the purpose of settling other Civilized Indians therein. By the Treaty of January 19, 1889, 25 Stat. 757, it paid the Indians a consideration of over $2,000,000 for a further cession of the same territory "entirely freed from any limitation in respect to the use and enjoyment thereof."

It is certain that the United States did not have absolute ownership of this domain, and that the Indians did have some title and interest therein, prior to March 1, 1889. This was the condition existing at the time of the Amendment of February 13, 1889, to the Choctaw Railway Act.

Therefore, petitioners say that respondent's supplemental brief is without weight as an answer to their contention that the Choctaw Railway Act was not a grant *in praesenti*.

At pages 8 to 10 of respondent's supplemental brief, the following proposition is urged:

Even if the Indians owned the fee title to the land to be traversed by the proposed railway at the time the Acts of Congress were enacted, still Congress could grant a railroad right-of-way in praesenti across the same.

Petitioners say that this proposition is effectively negatived by the authorities cited in their original brief and under the preceding proposition herein.

In support of it respondent cites *Spokane & British Ry.*

Co. v. *Washington & Great Northern Ry. Co.*, 219 U. S. 166. An examination of the case shows that no question presented in the instant cases is there considered or even raised. The Act of Congress there under consideration purported to grant a right-of-way *in praesenti*. The language is:

> "That there is hereby granted to the Washington Improvement & Development Company, a corporation, organized and existing under the laws of the State of Washington, and to its assigns, a right-of-way for its railway, telegraph and telephone lines through the Colville Indian Reservation in the State of Washington."

Section 2 of the Act provided that the Secretary of the Interior should fix the compensation to be paid the Indian allottees. There is nothing in the decision to show, and counsel for petitioners do not know, what sort of right or title the Indian Tribe or the Indian allottees had in this land. But the question of whether Congress had the power to grant a right-of-way *in praesenti* across allotted Indian land is not decided, considered or raised in that case. It might very well be that if an Indian allottee had asserted that Congress was without power to grant a right-of-way across his allotment for a compensation to be fixed by the Secretary of the Interior, this Court would have upheld his assertion.

The controversy in the reported case was between two railroad companies over a claimed right-of-way through the Indian Reservation, and the only question decided or considered was whether the grantee of the right-of-way under the Act of Congress had forfeited it by non-performance of the conditions of the grant. The Supreme Court of Wash-

ington held that it had not done so, and the Supreme Court of the United States held that whether it had or had not was a question that no one could raise but the United States, and that whether the granted right-of-way had been abandoned and forfeited was a State question and not a Federal one, and would not be reviewed by the United States Court. So there is nothing in that case that remotely touches any question in the instant cases.

Another case cited by respondent is *Butts* v. *Northern Pac. R. R. Co.*, 119 U. S. 55. That case involved an Act of Congress granting lands, not for a right-of-way, but in aid of the construction of the Northern Pacific R. R. Company. It is in terms of a present grant: "That there be and hereby is granted to the Northern Pacific Railroad Company, its successors and assigns, for the purpose of aiding in the construction of said railroad and telegraph lines, etc.," ten alternate sections of land per mile on each side of said railroad of the public lands of the United States not otherwise appropriated and free from preëmption or other claims or rights. At the time of the enactment of the law part of the lands granted were occupied by certain Indians and the second section of the Act provided that the United States would extinguish as rapidly as might be consistent with public policy and the welfare of the Indians, their title to all lands "falling under the operation of this Act, and acquired in the donation to the road."

It also appears that the Indians did not have a fee title to the lands, but only a mere right of occupancy. In the opinion the court said, referring to the Indian occupancy:

"But that fact did not prevent the grant of Congress from operating to pass the fee of the land to the company. The fee was in the United States. The Indians had merely a right of occupancy,—a right to use the land subject to the dominion and control of the Government. The grant conveyed the fee subject to this right of occupancy."

The Act of Congress having expressly so provided, certainly the railroad company took a fee title to the lands granted in aid of construction of its road, subject to the Indian right of occupancy, which encumbrance the United States undertook to extinguish and remove for the benefit of its donation to the railroad company.

There is nothing in this case that can throw any light on the issues in the instant case.

At pages 10 to 16 of respondent's brief, the proposition is urged that:

"Because the Choctaw Railway Act provided for payment by the railway of compensation to the Indians, Congress did not intend for the railway company to pay compensation to anyone else."

This proposition is, of course, absolutely true in respect of Indian Country, for no one but Indians had any right therein to be compensated. As pointed out in the Attorney General's opinion by Mr. Justice VAN DEVANTER, by its provisions the Act was applicable to and workable only in Indian Country, and when any land ceased to be tribal land and came under private ownership, its provisions had no application. This is also the position taken in President HARRISON's Veto Message.

Admittedly if the Act had purported to grant a right-of-way *in praesenti* through public domain, no settler on any public land after its enactment would have a right superior to the railway company's right-of-way. This petitioners have at all times freely conceded.

But since the Act did not grant a right-of-way *in praesenti,* then the railway company could acquire one through the public domain only by compliance with the provisions of the general statute of March 3, 1875, 18 Stats. 482. And if it sought a right-of-way under that statute, all rights of settlers arising prior to the filing of its map of definite location were superior to its right.

In support of its contention, the respondent cites *City of Reno* v. *Southern Pac. Co.,* 268 Fed. 751. That case involved an Act of Congress granting a railroad right-of-way *in praesenti* through the public land. The court held, in accordance with all the authorities, that a settler on unsurveyed public land which was not subject to preëmption or homestead, acquired no right thereto against the United States, and that the United States could, and by the Act in question did, grant the railway company a title vesting *in praesenti* to a right-of-way through such land, and that such title was superior to that of a mere squatter thereon. The facts of the instant cases are so wholly different that that case can not by any sort of reasoning be tortured into a precedent for respondent's contention.

In respect of the *Higgins* case, the respondent, at pages 16 to 19 of its supplemental brief, sets out:

"Additional reasons for denying relief in the Higgins case because of the state question involved."

On this counsel refer to what they term "technical objections" to respondent's pleadings raised for the first time by petitioners in their reply brief in this Court. An examination of that brief shows that no technical objections, and no objections of any sort, were there raised to the pleadings, and none are raised now. The point made there, and again made here, is that respondent's pleading in the trial court, which was entirely proper as a defense and of which no criticism is made, absolutely negatives the contention which it now makes in respect of the Higgins deed.

The respondent pleaded that the deed of the Higgins ancestor never conveyed any title to the land involved in that case to the railway company. The trial court made a general finding in favor of the defendant, which is a finding in support of this defense pleaded by respondent.

Petitioners say that respondent is attempting to raise in this Court a question not urged in either of the courts below and which constitutes a complete reversal of its pleadings and of its position in them.

Petitioners say further, as pointed out in their reply brief, that the Supreme Court of Oklahoma held in direct and unequivocal language that the Higgins deed conveyed no title to the railroad company and that when it abandoned the right-of-way, its title thereto was extinguished and the

land reverted either to the petitioners claiming under the patent of the United States to Higgins, or to the respondent, the City of Oklahoma City. The case was presented and was decided squarely on the question of to whom the reverter went, and not upon any contention that the railroad company acquired a fee title to the right-of-way by the Higgins deed and conveyed this title to the respondent by its deed.

Respondent says further that the record shows, and that petitioners know, that the contention was made in both the Oklahoma Courts that the deed executed by Higgins and his wife to the railway company conveyed the absolute fee. We flatly deny the correctness of this statement and say that respondent's counsel are mistaken.

On the contrary, in the trial of the case, in which none of present counsel for respondent participated, or were present, the then counsel for respondent stated in open court in argument that it placed no reliance for its title on the deeds from Higgins to the railway company, and from the railway company to it. And this position taken by the respondent in the Supreme Court of Oklahoma led that Court to say in its opinion:

> "It is conceded that upon abandonment by the railroad company its title terminated." (R. 210.)

As pointed out in petitioners' reply brief, there is nothing in the cases of *Marland* v. *Gillespie,* 168 Okla. 376, 33 Pac. (2d) 207, and *Oklahoma City* v. *Dobbins,* 172 Okla. 194, 44 Pac. (2d) 148, that can even remotely support the belated contention of respondent made here for the first

time that the Higgins deed to the railroad company conveyed a fee simple title.

On this subject petitioners submit the following proposition:

> **"This court ought, in event the Higgins case is reversed, to order and direct that the trial court enter judgment for the petitioners."**

It is evident from respondent's supplemental brief that counsel expect upon reversal of the Higgins case to be able to change the theory on which it was tried, submitted and decided in both the lower courts, and by raising new issues and taking a new position, to retry it, hoping to win it on a theory and issues wholly different from those on which it has thus far been presented, and, whether successful or not, to drag the petitioners through another weary five years in the lower courts before a final judgment is obtained.

Petitioners say that respondent should by this Court be held to the record as made and to its theory of the case in both the lower courts, and if by reversal of those courts, it loses on that theory, then this Court should order and direct the trial court to enter judgment for the petitioners and not permit respondent, after having lost its case on one theory, to change front, amend its hold, and try it on another. If this were permitted once, it might be repeated indefinitely. This is the very sort of procedure for which respondent in its brief is seeking to lay the foundation. Petitioners feel strongly on this point and most respectfully urge it upon the consideration of the Court. Surely, since

the only questions now in the cases are federal questions on which the decision of this Court will be final, it should order and direct by its mandate, in event of reversal of the lower courts, the entry of a judgment for petitioners.

"The Land Office Decision in Abilene Oil Company vs. Choctaw, Oklahoma & Gulf Railroad Company."

There is nothing in this land office decision cited by respondent, and copied in full as an appendix to its supplemental brief, that could aid in a decision of the instant cases. There is in it a statement to the effect that the Choctaw Railway Act was a grant of title *in praesenti,* and this statement is based on some of the same cases, or cases of the same character, as those cited and relied on by the Supreme Court of Oklahoma in its decision involving grants of right-of-way through the public domain. The fact that the Choctaw Railway Act did not relate to land in the public domain, nor purport to grant a title *in praesenti,* is not suggested or considered and none of the authorities which would support such fact are considered or cited. Indeed, there is a suspicion of collusion or indifference by the parties as to this point, because none of the authorities contrary to the holding announced, though superior in weight and precisely to the point, are cited. These authorities to the contrary are *Cherokee Nation* v. *Southern Kansas Ry. Co.,* 33 Fed. 900; *Cherokee Nation* v. *Southern Kansas Ry. Co.,* 135 U. S. 641; *United States* v. *Fort Smith & Western Ry. Co.,* 195 Fed. 211; and the opinion of Assistant Attorney General Van Devanter, reported in 27 Land Office Decisions 414. In the light of these the Department's statement in the decision is not entitled to weight as a precedent,

and it would seem clear that, if they had been presented to and considered by the Department, its statement on this point would have been different.

The statement as made may be explained by the fact that the question of the character of title the railroad company took under the Choctaw Railway Act was not really involved in the issue presented in that land office case, and the holding thereon is *obiter*. The only thing necessary to to determine in respect of the character of the railroad company's title was that it did not have an absolute fee simple, but only an easement or limited fee in the surface. This would have been true whether its title was acquired under the Choctaw Railway Act as a grant *in praesenti*, or under the general railroad right-of-way act of March 3, 1875, or by condemnation and purchase. The question for decision was not how the railroad company got its easement or limited fee, but who owned the underlying servient estate or reversionary right, which, so it was held, included the mineral right. On this point the Department, in our opinion, reached the correct conclusion. But it was wrong in assuming, and the assumption was wholly unnecessary to the conclusion, that the Choctaw Railway Act granted a right-of-way *in praesenti*.

Again it will be observed that the title to the land involved in that decision had an entirely different history from that of the land involved in the instant case. That land is the southwest quarter of Section 34, which lies east of the Santa Fe tracks and which was by executive order withdrawn from settlement prior to the Opening and on April 20, 1889, and made a Military Reservation. The title

to it never passed to any private individual and no private rights of any sort ever attached thereto until it was conveyed by Act of Congress of August 8, 1894, to the City of Oklahoma City, in trust for its public schools. It never was patented, filed on or settled on by a private individual. The railroad company was suffered by the United States, without objection, and there was no one else who could object, to construct its road across this quarter section. Whether this was done under authority of the Choctaw Act, or the general railroad right of way act of March 3, 1875, or merely by sufferance on the part of the United States, does not appear and is not material. The Act of Congress of August 8, 1894, transferred the title of the United States to all of the quarter section except the railroad's right of way and station grounds and other minor reservations.

The Department's decision holds that this grant operated to convey the underlying title or servient estate of the United States in the land occupied for railroad purposes. In this regard the decision is in harmony with the contentions of the petitioners in the instant cases. One of their alternative contentions is that even assuming, but not admitting, that the railroad company took a title vesting *in praesenti* to a right-of-way, still the underlying servient estate or reversionary right therein passed by patent from the United States to the townsite trustees for the townsite of Oklahoma City, and by trustees deed to the ancestors of the petitioners. This is the same conclusion arrived at in the land office decision and we think it is correct.

In this regard the only distinction between the claims

of title to the servient estate or reversionary right in the railroad right-of-way east of the Santa Fe tracks and that west of them, is that in respect of the land east of them title was conveyed to the City, not by patent, but by a special Act of Congress, while in respect of the land west of them, being that involved in the instant cases, title was conveyed from the United States to those under whom petitioners claim by patent. It is held in the Land Office Decision cited that Congress could convey by special act the servient estate or reversionary right. If this be true, does it not necessarily follow, both logically and legally, that such servient estate or reversionary right would pass equally as well under the provisions of a general act of Congress, specifying certain terms and conditions under which the Land Department would have authority to issue a patent conveying the land to a private citizen as patentee, when such terms and conditions had been fully complied with and such patent actually issued?

The Department says in the decision:

> "That grant created a possibility of reversion in the Indians, but in as much as it is a matter of public history that the Indian title was extinguished as to the area involved here by Treaty of January 18, 1889, with the Creeks, and the Act of March 1, 1889 (25 Stat. 757), we may assume that the right of reversion passed to the United States."

If by a treaty of cession the right of reversion passed from the Indians to the United States, then why would such right not pass from the United States by its patent to a homesteader?

But petitioners submit that, under the Land Office Decisions themselves, which are not harmonious, the weight of authority is in favor of the contention of the petitioners here. In this connection the case of *W. S. Burch*, 45 L. D. 473, decided September 12, 1916 is cited.

In the *Burch* case the question was as to whether or not a railroad right-of-way across a tract of land should be excepted from the area of said tract to be conveyed by a patent, or whether the patent should convey the entire area subject to the railroad's right of occupation and use of the surface for its right-of-way. The authorities on both sides of the question are discussed fully in the decision. For the convenience of the Court the pertinent parts of this decision, which, as will be observed, is of some length, are reproduced in an appendix hereto.

That decision supports, both on reason and authority, the position that a patent issued in due course by the United States to a tract of land crossed by a railroad right-of-way conveys all the title in the tract which the United States has, and conveys the servient estate or reversionary right underlying the area included in the railroad right-of-way, subject only to the right of occupation thereof by the railroad company for railroad purposes.

Petitioners desire to cite additional authorities in support of the following proposition, which is the "Third Proposition" in their original brief:

> **"Whatever title the railway company may have acquired under the Choctaw Railway Act and by whatever method the same may have been acquired, it took only an easement or limited fee for railroad purposes in the surface, with the underlying fee or reversionary right in the Indian Tribe or in the United States, and this fee or right passed by patent from the United States and by mesne conveyances to petitioners' ancestors." (Original Brief, page 58).**

In respect of private grants, the Courts have taken strong ground that a deed by one owning land abutting on a railroad right-of-way conveys all and whatever right or title the grantor has underlying such right-of-way, unless such conveyance shows an affirmative intention to the contrary.

In the instant case the Oklahoma City townsite, being the southeast quarter of section thirty-three township twelve north, range three west, and the Higgins tract, being the southwest quarter of the same section, are traversed by the right-of-way involved. If conceivably the railroad company could have had title to a right-of-way at or before the time the United States issued its patents to these quarter sections, the patents, being without any exception or reservation on account of such right-of-way (R. 6 and 151), would convey all and whatever title the United States had underlying it.

The following authorities seem to support the foregoing:

Paine v. *Consumers F. & S. Co.*, 71 Fed. 626.
Barker v. *Lashbrook*, 128 Kan. 595, 279 Pac. 12.
Roxana Pet. Corp. v. *Sutter*, 28 Fed. (2d) 159.
Roxana Pet. Corp. v. *Jarvis*, 127 Kan. 365, 273 Pac. 661.
Rio Bravo Oil Co. v. *Weed*, — Tex. —, 50 S. W. (2d) 1080.
Shell Pet. Corp. v. *Hollow*, (10th C. C. A.) 70 Fed. (2d) 811.

In *Paine* v. *Consumers F. & S. Co.*, *supra*, Judge TAFT, in the decision, says:

> "The evils resulting from the retention in remote dedicators of the fee in gores and strips, which for many years are valueless because of the public easement in them, and which then become valuable by reason of an abandonment of the public use, have led courts to strained constructions to include the fee of such gores and strips in deeds of abutting lots, and modern decisions are even more radical in this regard than the older cases."

The foregoing authorities, in conjunction with those cited in petitioners' original brief, tend to support the position that there would be no benefit accruing to the United States from retaining an underlying fee or right subject to a railroad title to the surface in a strip of land a hundred feet wide, extending hundreds of miles through lands which had been patented in their entirety to private individuals, and no reason why the United States should want to retain such underlying fee or right and no reason why a patent of the United States purporting to convey the whole tract should not be construed to convey whatever

right, title and interest the United States might have underlying a railroad right to the surface.

The authorities here cited are suggested for the Court's consideration for whatever weight they may be entitled to on this proposition.

CONCLUSION

In conclusion it is respectfully submitted that upon the record as made and the authorities presented, the judgment and decision of the Supreme Court of Oklahoma and of the District Court of Oklahoma County in said State should be reversed and the causes remanded to said district court with directions to enter judgment for the petitioners.

Respectfully submitted,

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APPENDIX

W. S. BURCH

45 L. D. 473.

Instructions, September 12, 1916.

* * * * * * * *

VOGELSANG, First Assistant Secretary:

July 27, 1916, the Commissioner of the General Land Office submitted with request for instructions the question whether in the issuance of a fee patent to W. S. Burch, the purchaser of the allotment of Hiram Brown, a non-competent Shoshone allottee No. 242, including the N. E. ¼ S. E. ¼, Sec. 33, N. W. ¼, S. W. ¼, Sec. 34, T. 1 N., R. 4 E., W. R. M., Wyoming, the land covered by approved railroad rights-of-way should be excluded from the patent or whether such patent should be issued merely subject to the rights-of-way of the railroad companies.

* * * * * * * *

It has been the general practice of this Department to issue patents for lands crossed by rights-of-way *subject to the right of occupancy and user by railroad companies of their* approved rights-of-way and station grounds. The case of *Eugene McCarthy* (14 L. D., 105), involved a conflict of 2.72 acres between station grounds and a placer entry. The Department in concluding its opinion said:

> "The mineral claimant *must therefore take the land in dispute* (2.72 *acres*) *subject to the right of occupation by said company for station purposes.* It was held in *Dakota Central Railroad Company* v. *Downey* (8 L. D., 115, 120), that any patent granted 'which should include a portion of this grant to the railroad company, must therefore be subject to that grant, because the grant is already perfect and complete.'

"Patent may issue to said McCarthy therefore for said placer claim, *but subject,* as to that in conflict, *to the right of occupation by said company for station purposes.*"

In the case of *Pensacola and Louisville Railroad Company* (19 L. D., 386), it was held that the land over which a right-of-way is located may be disposed of by patent to others, *subject to whatever rights the company may have in the same.* This view was reiterated in the case of *Brucker* v. *Buschmann* (21 L. D., 114). The same principle was applied to a toll road the grant of a right-of-way for which arose pursuant to Section 2477, Revised Statutes, which provides that "the right-of-way for the construction of highways over public lands, not reserved for public use, is hereby granted." See *Wason Toll Road Company* v. *Townsite of Creede* (21 L. D., 351).

A right-of-way under this act of March 3, 1875 (18 Stat., 482), was involved in the case of *Mary G. Arnett* (20 L. D., 131), and the Department there said:

"The right-of-way clause should not then be inserted in the applicant's final certificate, unless it is necessary to protect whatever rights the railway company may have in the land by virtue of its grant.

"Under the act of March 3, 1875, *supra,* such protection does not appear to be necessary. The act itself affords ample protection to the company, if it has any rights which the courts may hereafter determine have not been forfeited. The language of section four of said act is, 'and thereafter *all such lands over which such right-of-way shall pass, shall be disposed of, subject to such right-of-way.' These lands are then disposed of, subject to such right-of-way, by virtue of the statute.*

"This is not a direction to the land department to insert limitations and restrictions in the final certifi-

cate and patent, but a legislative declaration of the reservation of a right-of-way to such railroad companies as may have complied with the law. The insertion of the right-of-way clause would answer no purpose except to embarrass the settler, and leaving it out does not affect the rights-of-way of any railroad company under said act."

* * * * * * * *

In the case of the *Southern Ute Allotments* (26 L. D. 77), in an opinion prepared by Assistant Attorney-General VAN DEVANTER, it was held *that fee patents should contain a clause setting forth that the conveyance was made subject to the railroad's right-of-way,* the grant being under the special act of June 8, 1872 (17 Stat., 339), which did not in terms protect the rights of the company.

In the case of the *Oregon Short Line Ry. Co.* v. *Harkness* (27 L. D., 430), a right-of-way across the Fort Hall Indian Reservation, for which $6,000 had been paid, was involved and such right-of-way land was embraced in the homestead entry of Harkness. It was there held that a reservation of a right-of-way should be incorporated in the final certificate and patent, where the right-of-way was obtained under a special act, but that no such reservation was required in the case of a right-of-way obtained under the act of March 3, 1875. In the case of *Denver and Rio Grande R. R. Co.* v. *Clack* (29 L. D., 478), it was again held that a reservation of a right-of-way granted under the act of March 3, 1875, in final certificate and patent, was not necessary and should not be inserted.

In instructions of November 3, 1909 (38 L. D., 284), as amended January 19, 1910 (38 L. D., 399), the practice as indicated and the distinction between rights-of-way under general and special acts was preserved and reannounced. *It will be borne in mind that the excepting or reservation clause involved was not an exclusion or elimination of an area of land but was a clause stating that the patent or con-*

veyance was subject to the right-of-way of the specific company under the particular special act. The above-mentioned regulations are cited and explained in the instructions of February 2, 1912 (40 L. D., 398), and it was there said:

> "Applicants to enter public lands that are affected by a mere pending application for right-of-way should be verbally informed thereof and given all necessary information as to the character and extent of the project embraced by the right-of-way application; and, further, *that they must take the land subject to whatever right may have attached thereto under the right-of-way application,* and at the full area of the subdivisions entered, irrespective of the questions of priority or damages, these being questions for the courts to determine."

In the case of the *Schirm-Carey and other placers* (37 L. D., 371, 374), the grant of the Atlantic and Pacific Railroad Company was involved. The 200-foot right-of-way covering about 107.33 acres, crossed the affected locations and had been excluded from the patent proceedings and the entry. The Department said:

> "The difficulties and perplexities involved in the various aspects of the case, in view of the practice with respect to the disposition of lands in a similar situation under other public land laws, as well as the serious question involved in the bisection of the claim by reason of the exclusion of the railroad right-of-way, is deemed by the Department to justify the conclusion reached by your office, *that in no event can the entry as to any of the claims be passed to patent in the absence of supplemental patent proceedings including the previously excluded area constituting the railroad right-of-way.*"

In instructions of March 13, 1911 (39 L. D., 565), involving the Northern Pacific right-of-way across the tribal

lands of the Fond du Lac Indian Reservation in Minnesota, where the company had paid $10 per acre for the area of its right-of-way, it was said:

"While the right-of-way granted the Northern Pacific Railway Company by the act of 1864 is a grant in fee, it is not a fee simple but is subject to reversion in the event that the company should cease to use the land for railroad purposes. *It is not the rule of the Department to except from patents issued to entrymen under the public land laws the area embraced in the right-of-way across the lands entered;* nor had it been the practice to relieve purchasers under the public land laws from paying for the full area of the tract purchased, notwithstanding that such purchase is made subject to the company's right-of-way.

"*To except from a patent a tract of land included in the right-of-way would be to reserve a narrow strip of land which, if abandoned by the railroad company, would revert to the Government and would not inure to the benefit of the purchaser of the subdivisions traversed by such right-of-way.*

"It is believed that damages paid by the railway company in this case were merely damages resulting from the construction of the railroad across the reservation and in no sense represented a purchase of the land covered by the right-of-way. As above indicated, therefore, I must decline to approve the letter prepared by your office."

* * * * * * * *

Considerable research has disclosed to the Department but two instances in which the acreage in a right-of-way has been ordered deducted from the legal subdivision affected and the land patented exclusive of such right-of-way. One of these cases is that of the Northern Pacific right-of-way and station grounds within the Flathead Indian Reser-

vation. By the act of July 4, 1884 (23 Stat., 89), $16,000 was appropriated by Congress to pay the Indians for the surrender and relinquishment to some 1,300 acres included in the right-of-way and 130 acres covered by station grounds pursuant to the agreement of September 2, 1882, between the Government and the Indians respecting such a cession. The railroad company paid into the Treasury said sum of $16,000 prior to the act. In a letter prepared in the General Land Office and approved by this Department, on April 25, 1910, it was stated that as the right-of-way strip and the station grounds had been relinquished prior thereto such lands were not subject to disposal under the acts of April 23, 1904 (33 Stat., 302), and May 29, 1908 (35 Stat., 448), providing for the disposition of the Flathead lands. The opinion was there expressed that title to none of such railroad lands should be disposed of to the homestead settlers and that in original applications and patent certificates there should be excluded the acreage covered by the right-of-way and the station grounds. The conclusion thus reached would appear to be directly contrary to the doctrine announced in the prior cases of the *Oregon Short Line* v. *Harkness,* and the *Southern Ute allotments, supra,* and also to the subsequent *Fond du Lac Reservation* case above cited.

The other instance of exclusion arose in connection with the case of *George F. Wunsch* (43 L. D., 551). It was there held that the 180-foot strip reserved and withdrawn under the act of June 25, 1910 (36 Stat., 847), for an electrical transmission line should be excepted and excluded in the entry papers and in the patent. Proper regulations under this decision were promulgated November 23, 1915 (44 L. D., 412).

* * * * * * * *

The Supreme Court in *Railroad Company* v. *Baldwin* (103 U. S., 426, 430), said:

"We are of opinion, therefore, that all persons acquiring any portion of the public lands, after the passage of the act in question, took the same subject to the right-of-way conferred by it for the proposed road."

In *Smith* v. *Townsend* (148 U. S., 490, 499), is found the following:

"Doubtless, whoever obtained title from the Government to any quarter section of land through which ran this right-of-way would acquire a fee to the whole tract subject to the easement of the company; and if ever the use of that right-of-way was abandoned by the railroad company the easement would cease, and full title to the right-of-way would vest in the patentee of the land."

This opinion was expressed in connection with the right-of-way through Indian land in Oklahoma arising under the act of July 4, 1884 (23 Stat., 73).

In the very recent case of *Rio Grande Western Railway Company* v. *Stringham*, decided November 1, 1915 (239 U. S., 44), a conflict between the right-of-way under the act of March 3, 1875, and a placer patent was involved. The opinion was prepared by Justice VAN DEVANTER, who was thoroughly familiar with the practice of the land department and who approved the conclusions reached in the *Southern Ute Allotment*, *Oregon Short Line* v. *Harkness*, and *Denver and Rio Grande Company* v. *Clack*, cases before cited. The following are certain excerpts therefrom:

"At the trial the facts were specially found and judgment for the defendants was entered upon the finding. In reviewing that judgment the Supreme Court of the State, accepting the findings below, held that the plaintiffs in virtue of proceedings had in the Land Department under the Right-of-way Act while the land was yet public acquired a right-of-way two hundred feet

wide through the lands afterwards embraced in the mining claim *and that the defendants' title under the placer patent was subject to this right-of-way*, and thereupon reversed the judgment and remanded the case with a direction to 'enter a judgment awarding to the plaintiff title to a right-of-way over the lands in question one hundred feet wide on each side of the center of the track.' 38 Utah 113. Acting upon this direction the trial court vacated its prior judgment and entered another adjudging the plaintiff to be 'the owner of a right-of-way' through the mining claim one hundred feet wide on each side of the center line of the railroad, declaring the plaintiff's title to such right-of-way good and valid, and enjoining the defendants from asserting any claim whatever to the premises, or any part thereof, *adverse to the plaintiff's 'said right-of-way.'*"

* * * * * * * *

"The right-of-way granted by this and similar acts is neither a mere easement, nor a fee simple absolute, but a limited fee, made on an implied condition of reverter in the event that the company ceases to use or retain the land for the purposes for which it is granted, and carries with it the incidents and remedies usually attending the fee. *New Mexico* v. *United States Trust Co.*, 172 U. S. 171, 183; *Northern Pacific Ry. Co.* v. *Townsend*, 190 U. S. 267, 271; *United States* v. *Michigan*, 190 U. S. 379, 398; *West Un. Tel. Co.* v. *Pennsylvania R. R.*, 195 U. S. 540, 570. The judgment under review does not in words so characterize the plaintiff's right nor was it essential that it should do so. It describes the right in the exact terms of the Right-of-Way Act and evidently uses those terms with the same meaning they have in the act. So interpreting the judgment, as plainly must be done, we thing it accords to the plaintiff all to which it is entitled under the act."

A homestead patent in conflict with the railroad right-of-way under the act of March 3, 1875, was involved in *Barlow* v. *Northern Pacific Ry. Co.* (240 U. S., 484). The court there treats the prior *rights of the railroad company as being "paramount"* and concludes that *the homestead patent* under the facts as found *was subject to the right-of-way.*

In view of the foregoing and of the well-established and long-continued practice of the land department with respect to the issuance of patents for lands crossed by prior rights-of-way, it is directed that the fee patent to be issued to W. S. Burch includes and describes the legal subdivision covered by the Indian allotment *inclusive of the right-of-way areas* and further that usual clause indicating *that the conveyance is subject to the two approved rights-of-way* mentioned be inserted. (All italics supplied by petitioners.)

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In the Supreme Court of the United States

OCTOBER TERM, 1935

No. 335

GEORGE NOBLE AND WILLIAM NOBLE,
Petitioners,

vs.

THE CITY OF OKLAHOMA CITY, A Municipal Corporation,

No. 336

ROBERT W. HIGGINS, Jr., JOHN T. HIGGINS, RALEIGH E. HIGGINS, BURFORD C. HIGGINS, ESTELLA JONES Nee HIGGINS, CASS W. HIGGINS, An Insane Person, by JACK JONES, His Next Friend and Duly Appointed, Qualified And Acting Legal Guardian, EVA H. McMILLAN, FAIRY ADKINS, GERTRUDE KOELSCH Nee HIGGINS, and NELLIE SHANNON, Nee HIGGINS,
Petitioners,

vs.

THE CITY OF OKLAHOMA CITY, A Municipal Corporation.

Response to Petition for Writs of Certiorari

HARLAN T. DEUPREE,
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J. H. JARMAN,
W. H. BROWN,
Attorneys for Respondent.

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SUMMARY AND CONCLUSION 58

In the Supreme Court of the United States

OCTOBER TERM, 1935

No. 335

GEORGE NOBLE AND WILLIAM NOBLE,
Petitioners,

vs.

THE CITY OF OKLAHOMA CITY, A Municipal Corporation,

No. 336

ROBERT W. HIGGINS, Jr., JOHN T. HIGGINS, RALEIGH E. HIGGINS, BURFORD C. HIGGINS, ESTELLA JONES Nee HIGGINS, CASS W. HIGGINS, An Insane Person, by JACK JONES, His Next Friend and Duly Appointed, Qualified And Acting Legal Guardian, EVA H. McMILLAN, FAIRY ADKINS, GERTRUDE KOELSCH Nee HIGGINS, and NELLIE SHANNON, Nee HIGGINS,

Petitioners,

vs.

THE CITY OF OKLAHOMA CITY, A Municipal Corporation.

Response to Petition for Writs of Certiorari

A

We believe the petitioners in their "Summary Statement of the Matter Involved" set forth a great many im-

material facts. In some instances they did not make as full disclosure of the facts as should be made in order for the court to understand the controlling issues in the cases. Furthermore, there are many conclusions stated which we do not believe are justified by the record. However, we shall not attempt to re-state the facts but shall only call attention to additional facts which in our judgment should be stated.

At page 3 of the petition it is stated that the United States conveyed "the fee title" to certain lands involved in these suits, to the Creek Indians. Respondent desires to make it clear that this conveyance does not purport to give the Creek Indians the absolute fee simple title to the land. The language of the patent is as follows:

> "To have and to hold the same unto the said Tribe of Indians so long as they shall exist as a Nation and continue to occupy the Country hereby conveyed to them." (R. 136 and C. M. 469 Noble)

At page 4 of the petition it is stated that Congress in approving the *Creek Treaty of Jan.* 19, 1889, by Act of March 1, 1889, 25 *Stats.* 757, provided:

> "That the lands acquired by the United States under said Agreement shall be a part of the public Domain."

In this connection attention is called to the fact that Congress, on the very next day, to-wit, March 2, 1889, passed an Act appropriating money to pay the Creek and Seminole Indians for all their claim and also providing for the opening of the Country to White settlement by the *Proclamation of the President of the United States.* (25 *Stats.* 1003)

Said Act of March 2, 1889, among other things provided:

"* * * but such release and conveyance, and extinguishment shall not inure to the benefit of or cause to invest in any railroad company any right, title, or interest whatever in or to any of said lands, and all laws and parts of laws so far as they conflict with the foregoing, are hereby repealed, and all grants or pretended grants of said lands and interest or right therein now existing in or on behalf of any railroad company, *except rights of way and depot grounds, are hereby declared to be forever forfeited for breach of conditions.*" (Italics supplied)

Pursuant to said Act of Congress, the President of the United States on March 23, 1889, issued his Proclamation opening the Country to settlement under the Homestead laws of the United States at the hour of twelve o'clock noon, on April 22nd, 1889. 25 *Stats.* 1544, 1 *Kapp. 2nd Ed.* 940. Said Proclamation declared among other things that:

"* * * it will at and after the hour of twelve o'clock noon of the 22nd day of April, next, and not before, be open for settlement under the terms and subject to *all the conditions, limitations and restrictions contained in said Act of Congress, approved March* 2, 1889 *and the laws of the United States applicable* thereto." (Italics supplied)

On May 2, 1890, Congress passed an Act organizing the territory of Oklahoma. 26 *Stats.* 81. This Organic Act, among other things, contained the following provision:

"No part of the land embraced within the territory created shall inure to the use or benefit of any railroad company, *except the right-of-way and lands for station grounds heretofore granted to certain corporations.*" (Italics supplied)

At page 5 of the petition it is stated that the land in-

volved in these suits was included in the Western half of the lands of the Creek Nation ceded to the United States, and then petitioners set forth the Acts of Congress relating to the construction of the line of railroad by the Choctaw Coal and Railway Company. Respondent believes that it is important that attention should be called to some other things which had preceded the right-of-way grants.

In *Art.* 20 *of the Treaty between the United States and the Creek and Seminole Tribes,* dated August 7th, 1856, 11 *Stats.* 699, 2 *Kapp. 2nd. Ed.* 756, it was provided:

> "The United States, or any incorporated company shall have the right-of-way for railroads or lines of telegraph through the Creek and Seminole Country."

And the Treaty in substance further provides that in case the right-of-way is granted to a corporation, the corporation shall be required to pay the Indian Tribe through whose land the right-of-way is granted and for all damages done to the holdings of the individual occupants of such land, according to the laws, customs and usages of such tribe by the encroachment of such right-of-way upon such holdings.

Moreover, it was provided in the said Treaty that was entered into with the Creek Tribe June 14, 1866, 14 *Stats.* 785, 1 *Kapp.* (*2nd Ed.*) 931, that Congress should have the right to grant rights-of-way to railroad companies through the said Creek country.

After the title to the Western portion of what is now Oklahoma was acquired from the Creek Indians by the United States June 14, 1866 (14 *Stats.* 785, 1 *Kapp.* (*2nd Ed.*) 931 R. 53) "to be sold to and used as homes for such other civilized Indians as United States may choose to settle thereon", the United States never sold the land

to any Indians nor did they ever permit any Indians to settle upon the land in the immediate vicinity of what is now Oklahoma City. This land, like a great many other tracts in Western Oklahoma, remained absolutely vacant and unoccupied from the time the United States obtained it in 1866, until April 22nd, 1889. Moreover, no person during this period of time, not even Indians, had a right to occupy the land.

Inasmuch as the United States had purchased the land from the Creek Indians in 1866 for the purpose of disposing of it to other Indians, and it had developed that all of the land was not needed for that particular purpose, Congress on March 3, 1885, (23 *Stats.* 362) passed an Act authorizing negotiations with the Creek Indians to release all restrictions on the United States as to the use of the land so that the United States could open it for White settlement. This situation resulted in the *Creek Treaty* dated Jan. 19, 1889, which released all claim of the Creek Indians and removed all restrictions as to the use. And the desire to open this unoccupied Country to White settlement, together with the desire to develop that portion of the Country occupied by Indians, doubtless resulted in the passage of the *Choctaw Coal & Railway Company Act of February* 13, 1889, referred to at pages 5 and 6 in the petition. The line of road described in the Act was to begin at a place near what is now Hartshorne or Haileyville, in Eastern Oklahoma, and extend to what is now Goodwin in Ellis County, located in the extreme western portion of what is now the State of Oklahoma.

At page 7 of the petition it is stated that the ancestors of petitioners in the Noble case, staked and occupied lot 6 in Block 36 in the townsite of Oklahoma City, the North 40 feet of which is involved in this litigation. In

this connection, respondent believes that there are some further facts which might be important:

At the time the ancestors of petitioners settled upon the lot in question the right-of-way of the Choctaw Coal and Railway Company was then staked out across the identical forty feet involved in the Noble suit. And it will be remembered that this forty feet is all that is involved in the Noble case. In addition to stakes being placed along the center of the right-of-way, there were also warning signs on the right-of-way, showing that it was claimed for right-of-way and station ground purposes. (R. page 97, 98, 113) This entire forty feet of land was also included in the first map showing the temporary location of the line of railroad (R. 90-B).

Petitioners state at page 12 of their petition that it was conceded at the trials in the State Court that upon abandonment of the land by the railroad company the land reverted either to the United States or to petitioners through their predecessors in title. Petitioners are in error in this statement, insofar as it relates to the Higgins case. Respondent throughout this litigation has always contended that neither Higgins nor Noble ever had any interest in the strip of land over which the line of railroad was constructed, because the Choctaw Coal & Railway Company was granted this right-of-way before the passage of the Act of March 2, 1889, which authorized the opening of this Country to White settlement, but respondent has also contended that even if it should be held that it is in error in this contention, still the deed (R. 152) executed by R. W. Higgins and his wife, to the Railroad Company, conveyed the absolute fee simple title to the Railroad Company and that the Railroad Company conveyed that title to the respondent.

We shall subsequently discuss this point at length.

B

Petitioners set forth on pages 15 to 19 inclusive of their petition, the "reasons relied on for the allowance of the writs." Respondent will hereinafter discuss these assigned reasons in its Answer to Petitioners' Brief.

ARGUMENT AND AUTHORITIES

Preliminary to our discussion of the Propositions discussed in petitioners' brief, we desire to submit a question which is applicable only to the Higgins case.

There was a non federal question in the Higgins case which is sufficient to sustain the decision of the Supreme Court of the State of Oklahoma and this Court has no power to disturb the decision.

The deed made by R. W. Higgins and wife, ancestors of petitioners, to the railroad company conveyed the absolute fee simple title to the railroad company. The railroad company in turn conveyed that title to the respondent. The Supreme Court of the State of Oklahoma did not discuss the point in its opinion, although it was briefed and argued. It will be remembered that the Noble and the Higgins cases were consolidated in the State Supreme Court and it will be observed that after the Supreme Court decided in favor of respondent on the Federal questions which involved the Congressional Acts, it did not discuss the non federal questions which was applicable to the Higgins case alone. However, on the same day the opinions in the consolidated cases were rendered by the State Supreme Court, it decided a companion case which involved a right-of-way deed which was executed prior to the time Oklahoma became a state and the Court in that case held that under the laws of Oklahoma Territory, which were in force at the time of the execution of the deed, the railroad company acquired the fee simple title to its right-of-way, and that said title was conveyed to the respondent by the railway company. The companion case mentioned is *Oklahoma*

City v. *Dobbins,* not yet officially published, but published in 44 P. (2d) 148.

As a matter of explanation, attention is called to the fact that in the downtown business section of Oklahoma City there were two lines of railroad. One was the line of the St. Louis & San Francisco Railway Company, commonly called "the Frisco" and the other was the line of Chicago, Rock Island & Pacific Railway Company, commonly called "the Rock Island." The rights-of-way and properties of these railroads were adjoining and their lines of railroad ran parallel to each other part of the way through the City. The Rock Island, which was a lessee of the Choctaw, Oklahoma & Gulf Railroad Company, a successor to the Choctaw Coal & Railway Company, claimed title to its right-of-way by and through the Acts of Congress involved in this litigation. The Frisco Railroad Company acquired its right of way generally by deeds and in some cases, by condemnation. And before these railroad companies would vacate these rights-of-way the respondents had to agree to purchase the rights-of-way. Inasmuch as these different railroad properties were adjoining there is involved in some of these suits pending in the State Courts, a portion of the Rock Island right-of-way and a portion of the Frisco right-of-way and the companion case above referred to and cited, involved the questions applicable to both situations. We are confident that the only reason the Supreme Court did not discuss the non federal question in the Higgins Case predicated on the deed, was due to the fact that it had held against the petitioners on the questions that were common to both cases and the court doubtless considered it unnecessary to deal with the same question involved in the companion case, and which had

just been decided. A part of the syllabus of the *Dobbins Case* is as follows:

> "Prior to statehood, under the statutory provisions existing in the territory of Oklahoma, a railroad corporation was vested with authority to acquire, own, and hold the fee simple title to real estate voluntarily conveyed to it."

It is now the settled law by the Supreme Court of the State of Oklahoma that a deed executed to a Railroad Company for right-of-way purposes, prior to statehood, conveyed to the railroad company the fee simple title to the land and that the railroad company has the right to sell the land just as an individual who purchases land.

In *Marland* v. *Gillespie*, 168 Okla. 376, 33 Pac. (2d) 207, the Supreme Court of Oklahoma had under consideration a deed which in many respects is very similar to the Higgins deed and the Court announced the law in the syllabus prepared by the Court as follows:

> "A deed from a grantor to a railway company containing the sentence 'The same being for a right of way for a railroad track as the survey thereof is now located and said grantee agrees to construct two grade crossings over its track for the use of grantor, and proper water ways under its track where there is heavy fills,' but not otherwise limited, conveys a fee-simple title; such sentence not being a limitation upon the quality of the estate conveyed."

Inasmuch as petitioners in their petition herein erroneously stated respondent's position in the State Courts, we shall quote verbatim what we said in our printed brief filed with the State Supreme Court. In quoting from this brief it will be remembered that the two Oklahoma cases hereinbefore cited had not been decided at

the time the brief was written. Respondent's brief on the point was as follows:

"EIGHTH PROPOSITION

"The Higgins deed conveyed to the Choctaw, Oklahoma & Gulf Railroad Company the absolute fee simple title to the land involved in the Higgins case; and said railroad company by its deed conveyed said title to the defendant, the City of Oklahoma City, which now owns said property.

"In making argument in support of this proposition, we trust that it will be remembered, that we have the greatest confidence in the soundness of our position on all the points hereinbefore discussed. We do not consider that any of the plaintiffs in the consolidated cases herein discussed have any vestige of title to any of the property involved; nor do we believe, that their predecessors in interest ever had any title to any part of the land. Moreover, we believe this Court will reach a conclusion on the controlling issues in these cases, long before it reaches this point of our brief.

"But, as has been hereinbefore incidentally shown, on March 24, 1898, R. W. Higgins and his wife, after he had received a patent from the United States for the quarter section of land, which includes the land involved in the Higgins suit, conveyed the said land, to the Choctaw, Oklahoma & Gulf Rail Road Company, which as the Court will remember, had succeeded to the rights of the Choctaw Coal & Railway Company, by virtue of a decree of the United States Court in a receivership proceeding; and by an Act of Congress passed in 1896.

"The Higgins deed was absolute and without any reservation and is set out in full at page 158, case-made Higgins. This deed is different from the one

involved in the Noble case, in that the Noble deed, as has been hereinbefore shown, *contained a reversionary clause.*

"After the Higgins deed was executed and delivered to the railroad company, that company and the Chicago, Rock Island & Pacific Railway Company held and used the land until said railroad companies on December 4, 1928, conveyed the land by deed to the City of Oklahoma City. That deed of conveyance appears at page 174 of case-made, Higgins.

"We tak the position that, if all the Congressional legislation which we have heretofore discussed, were entirely eliminated insofar as this case is concerned, the City would still have a valid fee simple title to the land involved in the Higgins case. This is true, because at the time R. W. Higgins and his wife executed the deed to the railway company, on the 24th day of March, 1898, the railroad company, under the laws, as they then existed, had the right to take an absolute fee simple title to land and, even if it should be held that the law since that time had been changed, still that would not defeat the title that the railroad company took by the Higgins deed. And most certainly, such a change in the law, if one has been effected, could not serve to reinvest the title in Higgins and his wife, or their heirs.

"Inasmuch as we have thoroughly presented this question of law in a brief which we have filed in the case of C. E. Dobbins, et al. v. The City of Oklahoma City, a companion case, now pending in this Court, as No. 24343, we shall not here undertake to present fully our views on this question. However, we shall here cite without comment, some of the authorities which we believe are absolutely controlling and fully sustain the correctness of this proposition.

Gilbert v. *M. K. & T. Ry. Co.*, 185 Fed. 102;
Section 1051, *Okla. Ter. Stats. of* 1890, the same being Sec. 11928 *O. S.* 1931;
Section 1052, *Okla. Ter. Stats.* 1890, the same being Sec. 11929, *O. S.* 1931;
Section 1053, *Okla. Ter. Stats,* 1890, the same being Sec. 11930, *O. S.* 1931;
Section 1054, *Okla. Ter. Stats. of* 1890, the same being Sec. 11931, *O. S.* 1931;
Sec. 2, Art. 9, *Session Laws of* 1903, the same being Sec. 9729, *O. S.* 1931;
Section 9698, *O. S.* 1931;
M. K. & T. Ry. Co. v. *City of Tulsa,* 45 Okla. 382, 145 Pac. 398;
Okla. Ry. Co. v. *Severns Paving Co.,* 67 Okla. 206, 170 Pac. 216;
Okla. Ry. Co. v. *Severns Pav. Co.,* 251 U. S. 104, 41 Sup. Ct. 73, 64 L. Ed. 168;
Coats & Hopkins Realty Co. v. *K. C. T. Ry. Co.,* 43 S. W. (2d) 817;
Kynerd v. *Hulen,* 5 Fed. (2d) 160;
Buckley v. *Morton,* 93 Okla. 45, 219 Pac. 685."

The Higgins deed it will be observed, not only was a conveyance to the Railroad Company, but it contained a release of damages. It will be remembered that at the time the railroad was constructed in 1890 or 1891, R. W. Higgins was having trouble before the Secretary of the Interior as to his right to homestead the Quarter Section of land, and this question was not fully settled before 1896; so when the deed was executed in 1898 it also contained provisions relating to damages, which were claimed prior thereto. But stripped of the phraseology relating to damages, the deed purports to be an absolute conveyance of a fee simple title to the railroad company and is very similar to the deed which was involved in *Marland* v. *Gillespie,* 168 Okla. 376, supra.

It being the settled law of the State of Oklahoma that before Statehood railroad companies which acquired their rights of way by deed took the absolute fee simple title thereto with the full right to convey the same, we believe in this case that it could serve no purpose for the Court to issue the writ prayed for.

In this connection, we call the court's attention to the following cases:

In *Browne* v. *Union Pacific Railroad Company*, 267 U. S. 255, 69 L. Ed. 601, the court said:

> "It is well settled that where the supreme court of a state decides a federal question in rendering a judgment, and also decides against the plaintiff in error upon an independent ground not involving a Federal question and broad enough to maintain the judgment, the writ of error will be dismissed without considering the Federal question." Hammond v. Johnston, 142 U. S. 73, 35 L. Ed. 941, 942, 12 Sup. Ct. Rep. 141; Enterprise Irrig. Dist. v. Farmers Mut. Canal Co., 243 U. S. 157, 164, 61 L. Ed. 644, 648, 37 Sup. Ct. Rep. 318.

In *Hammond* v. *Johnston*, 142 U. S. 73, 35 L. Ed. 941, the law is stated in the syllabus as follows:

> "Where the Supreme Court of a State decides a federal question in rendering a judgment, and also decides against the plaintiff in error upon an independent ground not involving a federal question and broad enough to maintain the judgment, the writ of error will be dismissed without considering the federal question."

In *Enterprise Irrigation District* v. *Farmers Mutual Canal Co.*, 243 U. S. 157, 61 L. Ed. 644, the court stated the law as follows:

> "Our jurisdiction is disputed and must be con-

sidered, as, indeed it should be, even if not challenged. As has been shown, several questions were presented to the Supreme Court and all were considered. One was whether the state board's decision could be given any conclusive effect consistently with the due process and equal protection clauses of the 14th Amendment, and another was whether the defense of estoppel in pais was well grounded. The first was plainly a federal question and the other as plainly non-federal. Both were resolved in favor of the canal company. The other questions, none of which was federal, may be put out of view in this connection. Thus we are concerned with a judgment placed upon two grounds, one involving a Federal question and the other not. *In such situations our jurisdiction is tested by inquiring whether the non-Federal ground is independent of the other broad enough to sustain the judgment.* Where this is the case, the judgment does not depend upon the decision of any Federal question and we have no power to disturb it." (Italics supplied).

In *Waters-Pierce Oil Company* v. *State of Texas,* 212 U. S. 112, 53 L. Ed. 431, the Court said:

> "It is well settled in this court, that where a state court decides a case upon an independent ground not within the Federal objections taken, and that ground is sufficient to maintain the judgment, this court will not review the case."

In *Leathe* v. *Thomas,* 207 U. S. 93, 52 L. Ed. 118, the Court states the law as follows:

> "The judgment purported to be based upon the referee's report, and it may be that, if it were our concern to deal with it, we should find it hard to discover sufficient warrant for a judgment on the first or second pleas. * * * But on the most favorable statement that we can make on the side of the

plaintiff in error we can see no ground for coming to this court.

"It is admitted that the general and well-settled rule is that in a case coming from a state court this court can consider only Federal questions, and that it cannot entertain the case unless the decision was against the plaintiff in error upon those questions, (Citing cases). It is admitted further, *that a decision upon those questions must have been necessary to the decision of the case, so that, if the judgment complained of is supported also upon other and independent grounds, the judgment must be affirmed or the writ of error dismissed,* as the case may be. Murdock v. Memphis, supra. But Murdock v. Memphis does not stop there. It further establishes that when the record discloses such other and completely adequate grounds this court commonly does not inquire whether the decision upon them was or was not correct, or reach a Federal question by determining that they ought not to have been held to warrant the result." (Italics supplied.)

Where the action of the State Supreme Court can be sustained upon a non-federal question, even if the court held against the federal question, the Supreme Court of the United States will not disturb the decision, regardless of what the State Court said on the federal question.

Sec. 648 *Rose Fed. Juris. and Proc.*, page 570.

FIRST PROPOSITION

The Act of Congress of Feb. 18, 1888 as amended by the Act of Feb. 13, 1889, was a grant in praesenti of a right of way to the Choctaw Coal and Railway Company.

At page 30 of the Petitioners' brief they take the opposite view from that expressed in the above proposition.

Notwithstanding that the Opinions of the Supreme Court of the State of Oklahoma in these cases are under attack herein, we believe no more conclusive argument showing the erroneous position of petitioners' could be produced than the Opinions. The Opinions show themselves that the Court not only fully understood the facts, but that it was thoroughly familiar with the Federal decisions dealing with Special Congressional Right-of-way Grants. And the decisions of the State Supreme Court are in harmony with all of the Federal decisions on the question.

In attempting to construe the Acts of Congress involved petitioners seek to place a construction upon the Act which we believe is too narrow; and they assume as a predicate for their reasoning, conditions and situations which did not obtain at the time. It will be observed from page 31 of their brief that petitioners attempt to make a point out of the fact that the word "grant" was not used in the Title of the Act, nor in section 2 thereof. And they assign as one of the reasons why the word "grant" was not used is because the land over which the line of railroad was to be built was owned "in fee simple" by the Indian tribes. To predicate an argument upon the assumption that the title to the land belonged in fee simple to the Indian Tribes is unwarranted.

It will be remembered that by the Treaty of 1856, with the Creeks and the Seminoles, the United States were given the right to grant railroad rights of way through the Creek and Seminole Country. This same right was preserved to the United States by the Treaty

of 1866. The only limitation which was placed upon the powers of Congress to grant rights of way absolutely, through the Creek and Seminole Country, was that when the railroad right of way was granted to a corporation Congress should require the corporation to pay the Indian Tribe through whose land the right of way was granted and for all damages done to the holdings of the individual occupants of such land, according to the laws, customs and usages of such tribe, by the encroachment of such right of way upon such holdings.

It will also be remembered that the right of way which was granted by the Act of Feb. 13, 1889, extended from a place near Hartshorne or Haileyville, in what is now Eastern Oklahoma, to a place what is now Goodwin, in Ellis County, Oklahoma, which is in the extreme Western portion of the State of Oklahoma. Congress in granting the right-of-way must have known that there were at least three different situations relating to title which would be encountered in constructing a line of railroad from Haileyville in eastern Oklahoma to Goodwin, in the extreme western part of the State, to-wit:

1st. Some of the land over which such a railroad would be constructed belonged to the Indian Tribes with a possibility of reverter to the United States, in case the Indian Tribes ceased or abandoned the country; and

2nd. Even in case the land really belonged to the Indian Tribe, as set forth in the next preceding paragraph, occasionally there would be encountered improvements of individual occupants of such land, according to the laws, customs and usages of such Tribe; and

3rd. Land which belonged to the United States, which was absolutely unoccupied as the land in and about the City of Oklahoma City. This land, it will be remem-

bered, had been owned by the United States and had been absolutely unoccupied since the United States purchased it from the Creek Tribe by the Treaty of June 14, 1866. 14 *Stats.* 785.

It is elementary that the Congress of the United States has the absolute power to dispose of the lands which belong to the United States as it sees fit and proper. *Ruddy v. Rossi,* 248 U. S. 104, 39 Sup. Ct. 46, 63 L. Ed. 148.

During the period from 1850 to 1890, the Congress of the United States had granted right-of-way after right-of-way to railroad companies and virtually all of these rights-of-way insofar as they affected lands which belonged to the United States, had been given absolutely free to the railroad companies. That doubtless was the very thing that Congress intended in the Acts now under consideration.

Congress, by Treaty with the Indians had the right to grant the right-of-way over the Indian land, but the Treaty provided that the Indians should be paid for the land and it will be observed from the Acts now under consideration that they made ample provision for the protection of Indian rights; but they did not make provision for compensating any other persons. In fact, it was not intended that any other persons should be compensated. We believe that, when the facts, circumstances and conditions are all taken into consideration, there can be no escape from the conclusion that the Congress of the United States granted to the Choctaw Coal & Railway Company a free right-of-way to take effect in praesenti insofar as the right-of-way affected the property rights of the United States; and wherever the right-of-way affected Indian rights the Indians of course, had to be compensated for any damages which they sustained.

It is true that the word "Grant" is not used in the

title of the Act nor in Section 2 thereof, but the title of the Act and Section 2 thereof contains language very applicable to the situation which then obtained. It will be observed that it used the phrase "to take and use a strip" and we believe that Congress by using the words "to take and use" made use of language which under the peculiar circumstances was stronger and more effective for the purpose of granting a title to the right of way in praesenti than if Congress had just used the word "grant."

Petitioners insist that the Act only gave the Railroad Company the right to acquire by condemnation. In *Wulzen* v. *Board of Supervisors* (Cal.) 35 Pac. 353, 356, the court in defining the meaning of the phrases "to acquire" and "to take" used the following language:

> "'To acquire' is, in the law of contracts and descents, to become the owner of property; to make property ones own. 'To take' signifies 'to lay hold of', and when applied to lands, implies 'to gain or receive into possession;' to seize; to deprive one of the possession, to assume ownership."

It seems to us that the above explanation of the terms "to acquire" and "to take" is sufficient to show that Congress intended then and there to give the railway company the right-of-way and station grounds outright in praesenti, subject, of course, to the Indian rights for which the railway company was required to pay compensation.

This view is strongly corroborated by Section 10 of said Act, which is in part as follows:

> "That the said Choctaw Coal & Railway Company shall accept this right-of-way upon the express condition, binding upon itself, its successors and assigns, that they will neither aid, advise nor

assist in any effort looking toward the changing or extinguishing the present tenure of the Indians in the land and will not attempt to secure from the Indian Nations *any further grant of land* or its occupancy, than is hereinbefore provided." (Italics supplied).

The use of the expression "further grant of land" certainly must be considered as congressional interpretation of the Act that there was a present grant by the Act itself.

And in Section 13, we have the following language:

> "That the right-of-way *herein and hereby granted* shall not be assigned or transferred in any form whatever prior to the construction and completion of the road," etc. (Italics supplied).

We cannot conceive of stronger language than that just quoted.

If Congress did not intend to grant the right-of-way to take effect in praesenti, why did it use the words: "herein and hereby granted" in that part of the Act which prohibited the railway company from selling the right-of-way before the line of road was constructed?

This view of the Act is also strongly supported by *Mackey, County Treasurer*, v. *Choctaw O. & G. R. Co.*, 261 Fed. 342, decided by the Circuit Court of Appeals for the Eighth Circuit, October 14, 1919. This identical Choctaw Coal & Railway Company Act and the character of title granted thereby, were before the court in that case. It will be observed from a reading of the case, that the court spoke of the right-of-way as one "granted by Congress in praesenti" and treated it as the same character of title that was granted under other special railroad right-of-way grants and cited several cases based upon other right-of-way grants by Congress, about which

there can be no controversy as to the title being granted in praesenti, for the basis of the court's decision.

This *Mackey case* was appealed to the Supreme Court of the United States and the decision of that court is reported in 256 U. S. 531, 65 L. Ed. 1076, 41 Sup. Ct. 582.

From a reading of that decision it will be noticed that the Act was treated by the Supreme Court of the United States as one granting a right-of-way to the Choctaw Coal & Railway Company. The beginning of the second syllabus is as follows:

> "The right-of-way and station grounds of a railroad in Oklahoma *which were* granted by Congress," (Italics supplied).

And in discussing the character of title that the railway company took under the Act, the court treated the title as being of the precise character as the title to rights-of-way granted railroad companies by other special Acts over the public lands.

It will be remembered in considering the Mackey case supra, that Holdenville, Oklahoma, is in the Eastern portion of the Creek Nation and that portion of the State is not embraced in the lands ceded to the United States in the Treaty of June 14, 1866.

The Supreme Court of the Territory of Oklahoma, in *Churchill* v. *Choctaw Railroad Company*, 4 Okla. 462, 46 Pac. 503, had before it for interpretation the same Act of Congress which is involved in the instant cases and it held that said Act was a present absolute grant of right-of-way to the Choctaw Coal & Railway Company and it will be remembered that the land involved in the last cited case was only a short distance west of the tracts of land involved in the instant cases. The ter-

ritorial Supreme Court also made the same holding in *U. S.* v. *Choctaw, Oklahoma & Gulf R. R. Co.*, 3 Okla. 404, 41 Pac. 729.

It is not necessary that Congressional grants contain technical words of grant; it is only necessary that the intent of the grantor be ascertained and then such construction will be given the words used as to render them efficacious to accomplish such purpose. *Rutherford* v. *Green's Heirs*, 2 Wheat, 196, 4 L. Ed. 218. In *New York Indians* v. *United States*, 170 U. S. 1, 18 Sup. Ct. 531, 42 L. Ed. 927, in the granting part of the Treaty, the term "United States agree to set apart," etc., was held a grant of land in praesenti. Clearly there were no technical words of grant in the phrase "agree to set apart." See, also, *Winona & St. Peter Ry. Co.* v. *Barney*, 113 U. S. 618, 28 L. Ed. 1109; *U. S.* v. *Denver & Rio Grande Ry. Co.*, 150 U. S. 1, 37 L. Ed. 975.

Not only do the plain terms of the Choctaw Coal & Railway Company Act show a clear intention on the part of Congress to grant a right-of-way in praesenti to the Railway Company, but the Act of March 2, 1889, 25 *Stats.* 980, making appropriation to pay the Creek Indians in full for their entire claim to the land and authorizing the Country to be opened to White settlement and the President's opening Proclamation of March 23, 1889, 25 *Stats.* 1544, and the Organic Act of May 2, 1890, 26 *Stats.* 81, contain clear and specific provisions reserving all rights-of-way for railroad companies and protecting their rights therein. Even if it could consistently be held that the Choctaw Coal & Railway Company Acts did not grant a right-of-way in praesenti, by reason of Indian rights, the said Act of March 2, 1889 and subsequent Acts were sufficient within themselves to grant the right-of-way to the Choctaw Coal & Railway

Company. And it will be remembered that these Acts were passed by Congress after all claim of the Creek Nation had been ceded to the United States. In said Act of March 2, 1889, it is provided as follows:

> "But such release conveyance (meaning the Creek and Seminole conveyances) and extinguishment shall not inure to the benefit of or cause to vest in any railroad company any right, title or interest whatever in or to any of said lands, and all laws and parts of laws, so far as they conflict with the foregoing, are hereby repealed, and all grants or pretended grants of said lands or any interest or right therein now existing or on behalf of any railroad company, *except rights-of-way and depot grounds, are hereby declared to be forever forfeited for breach of condition.*" (Italics supplied).

In the *President's opening Proclamation,* dated March 23, 1889, it was specifically declared that:

> "It will, at and after the hour of twelve o'clock noon of the twenty-second day of April, next, and not before, be open for settlement, under the terms of and subject to, *all the conditions, limitations and restrictions contained in said Act of Congress, approved March second, eighteen hundred and eighty-nine, and the laws of the United States applicable thereto.*" (Italics supplied).

In *Section* 18 *of the Organic Act of May* 2, 1890, is the following language:

> "All tracts of land in Oklahoma Territory which have been set apart for school purposes, to the educational societies or missionary boards at work among the Indians shall not be opened for settlement, but are hereby granted to the respective educational societies or missionary boards for whose use the same has been set apart.

> "No part of the land embraced within the territory hereby created shall inure to the use or benefit of any railroad corporation, *except the rights-of-way and land for stations heretofore granted to certain railroad corporations*" (Italics supplied).

We believe it is clear that Congress did not intend that the railroads which had been granted rights-of-way through this Country should be forced to rely upon some technical language that might be found in the Acts themselves, but that it intended to make it clear and positive every time it passed a law relating to the lands in this Country that the railroad rights-of-way should not be interfered with. In the last quotation above set forth we believe it is certain that the Congress of the United States intended to give certain lands to the Missionary Boards, etc. and at the same time and with language equally as clear and significant, Congress made it plain that the rights-of-way previously granted to railroad companies should absolutely belong to the railroad companies.

At pages 31 and 39 of petitioners' brief, they cite *United States* v. *Fort Smith and W. R. Co.*, 195 Fed. 211, as authority to show that the Supreme Court of the State of Oklahoma placed a wrong construction upon the grants to the Choctaw Coal & Railway Company. That case has no application to any issues in the instant cases. There was only one question before the court for determination, and that was whether the railroad company should be required to pay the Creek Nation $50.00 per mile for right-of-way over land which had been previously allotted in severalty to the various members of the Tribe. The Creek Nation had no interest in the land at the time the suit was brought because the land had been allotted to the Indians in severalty. Of course, in

a case where the issues were thus drawn, there was only one question for the court to determine, and that was the right of the Nation to collect from the railroad company $50.00 per mile for a right-of-way. When the court determined that question, that decided the case. All comment on other questions by the court was purely dictum; and such statements were made without any thought or reference to such issues as are to be decided in the instant cases.

Moreover, Congress, on March 2, 1899 (*Chap.* 374, 30 *Stats.* 330 *Secs.* 1 *and* 2) which was the day before it passed the *Fort Smith & Western Act,* expressly authorized railroad companies to exercise the power of Eminent Domain "to take rights-of-way through any land held by an Indian Tribe and through any Indian Reservation in the Territory" on condition that it should "make compensation therefor to the Nation, to any occupant, and *to any allottee* for the damage resulting by taking of the right-of-way, and the construction of the railroad."

And in the Act of March 3, 1899, which is the *Fort Smith & Western Railway Act,* (*Chap.* 453, 30 *Stats.* 1368) it was specifically provided that before the company should construct its railroad through any of the lands held by individual occupants, "according to the laws, usages and customs of the Creek Nation, *or under the laws or Treaties of the United States,* compensation should be made to such occupants for all their property to be taken or damage to be done to them by reason of construction." It is patent, from reading the above statutes that quite a different situation obtained at the time of the enactment of the *Fort Smith & Western Act* from that which existed when the *Choctaw Act* of 1888 as amended in 1889 was passed.

The *Fort Smith & Western Act,* when considered in connection with the Act of Congress which was passed on March 2nd, 1899, the day before the passage of the *Fort Smith and Western Act,* is a great deal broader and quite different from the *Choctaw Coal & Railway Company Act.* Those Acts not only provided for paying individual occupants, "according to laws, usages and customs of the Creek Nation," but also provided for paying any allottee or any person who held under *any laws or Treaty* of the United States. However, it will be noted, that those Acts specified in expressed terms who should be paid compensation. Under those Acts, the Creek Nation after it had parted with title to the land, and had conveyed all the interest it had to individual allottees, sought to recover $50.00 per mile from the railroad company. Of course, the court held that the Creek Nation, under such circumstances, had no interest in the land, and, therefore, was not entitled to recover. That was the only issue before the court in the *Fort Smith & Western Railroad Company case,* and that was the only proper question for the court to consider, and it was the only question decided.

At page 47 of petitioners' brief they cite *Cherokee Nation* v. *Southern Kansas Railway Co.,* 33 Fed. 900, and also at page 49 of their brief, they cite the opinion of the Supreme Court of the United States in the same case reported in 135 U. S. 641 as authority for their contention that the Choctaw Coal & Railway Company Acts were not grants of right-of-way in praesenti. That case has no application to any issue in the instant cases.

The only question in the Cherokee case was whether Congress had the right to authorize a railroad company to acquire the Cherokee title by condemnation. The suit

was between the Cherokee Nation and the Railroad Company. The court, as was only proper, discussed the question as between the railroad company and the Cherokee Nation. The only language used by the court in the Cherokee case which could be considered as being in any wise favorable to the contention of plaintiffs was dictum and it was used as before stated, in discussing an issue wholly between the Cherokee Nation and the Railroad Company as to the power of Congress to grant the railroad company the right to acquire the Cherokee title by condemnation.

At page 53 of petitioners' brief they say the *Fort Smith & Western case* above cited, is especially pertinent because the court holds that *St. Joseph & Denver R. Co.* v. *Baldwin,* 103 U. S. 426, has no application and they proceed to draw the conclusion that inasmuch as the Baldwin case has no application to the *Fort Smith and W. R. Co. Case,* it has no application to the case of *Churchill* v. *Choctaw R. Co.,* 4 Okla. 462, *supra,* and seek by this method to destroy the effect of the decision in the *Churchill case.*

It will be remembered that the *Mackey case* above referred to was predicated on the identical *Choctaw Coal & Railway Co. Act* which is involved in the instant cases and it will be observed that the Supreme Court of the United States in the *Mackey case* predicated its opinion upon a previous opinion rendered by it in *Rio Grande & W. R. Co.* v. *Stringham,* 239 U. S. 44, 60 L. Ed. 136, decided Nov. 1, 1915, and the decision in the *Stringham case* was predicated on *Northern Pac. R. Co.* v. *Townsend,* 190 U. S. 267, 47 L. Ed. 1044, and the *Townsend case* was based upon the *Baldwin case.* Consequently the *Mackey case* decided by the Supreme Court of the United

States, and which involved the identical Choctaw Coal & Railway Company right-of-way grant and the *Churchill case,* decided by the Territorial Supreme Court, which also involved the same grant, were both predicated upon the *Baldwin case.* In view of these decisions, the holding in the *Fort Smith & Western R. Co. case* that the *Baldwin case* had no application only confirms our position that the *Fort Smith & W. R. Co. case* has no application to any issue in the instant cases.

SECOND PROPOSITION

Petitioners in the Second Proposition of their brief discuss a question which is not, under the facts and circumstances material or applicable to any issue in the instant cases. However, inasmuch as petitioners, at page 58 of their brief, make the contention that the ancestors of petitioners in the Noble case settled on the land involved on the day of the opening of the Country to White settlement and that such occupancy gave the ancestors a prior right to the land, as against all others except the United States, we respectfully request that it be borne in mind that the Railway Company was given the right-of-way Feb. 13, 1889; that Congress thereafter, on March 2, 1889, passed the Act authorizing the opening of the Country to White settlement; that the Railway Company, before April 22, 1889, the day of the opening, had surveyed its line of road and had staked its right-of-way across the very land settled on by the ancestors in the *Noble case* and that such settlement was made in disregard of the rights of the Railway Company and with full knowledge of the fact that the land was then being claimed by the Choctaw Coal & Railway Company for a right-of-way.

Furthermore, this identical land was all included in the map of the temporary survey, filed with the Secretary of the Interior July 13, 1889, and that the line of railroad was thereafter actually constructed over the land and the construction thereof fully approved by Congress, (29 Stats. 98) and the Secretary of the Interior. (R. 88). In other words, notwithstanding that both the rights and the occupancy of the railway company were prior in time to the occupancy of the said ancestors, the ancestors wholly disregarded and ignored the claims of the railway company.

At page 58 of their brief, petitioners say:

> "It was conceded in the trial court and in the Supreme Court below that unless the Railway Company's title to its claimed right of way through the Oklahoma City townsite vested instantly under the Act of Congress, then its title thereto was not prior and superior, but was junior and inferior, to the claims of the petitioners' predecessors in title."

The above quotation does not correctly state the position respondents took before the State Courts, and it is with regret that we are forced again to refer to the position respondents took before the State Courts. However, inasmuch as written briefs were filed it is an easy matter to establish the contentions of respondent. In discussing the title of the Railway Company to the right-of-way, respondents insisted that even the Act of March 2, 1889 was sufficient within itself to grant the right-of-way.

The contention is set forth at page 71 of respondents' brief, filed with the State Supreme Court, in the following language:

> "This action of Congress (the reservation of Railroad Rights of Way in the Act of March 2, 1890)

> is enough within itself to give the railway company a vested title to the right of way and depot grounds and it cannot be urged that Indian rights prevented the railroad company from taking under this Act. This action of Congress, if it had not been previously done, placed the right of way granted to the Choctaw Coal and Railway Company, in so far as it went through the lands of Oklahoma Territory belonging to the United States, in exactly the same position as railroads to whom other special grants of rights of way through the public lands had been made and in which no provision had been made for compensation to those who might thereafter settle upon such rights of way. All this, it will be remembered, was done before this country was opened to white settlement and at a time when the United States owned the land outright and could do as Congress saw fit and proper regarding it."

And after using the above language the respondents proceeded to discuss the President's opening Proclamation, dated March 23, 1889 and the Organic Act passed by Congress May 2, 1890, as they related to Railroad rights-of-way. The same points have been herein before discussed.

THIRD PROPOSITION

Petitioners' Third Proposition discussed at page 58 of their brief, is devoted to a variety of questions. They first discuss the character of title that a Railroad Company takes to a right-of-way by a grant from Congress. That question has been decided so many times that we do not believe any good purpose could be served by devoting time to it here, except as an incidental matter.

We observe that petitioners, in discussing the character of a right-of-way title did not cite *Mackey, Coun-*

ty Treas. v. *Choctaw, Oklahoma & Gulf R. R. Co.*, 256 U. S. 531, 65 L. Ed. 1076. That case passed on the character of title granted to the Choctaw Coal & Railway Co. by the very Acts of Congress involved in the instant cases. It will be observed that the Supreme Court in that case placed the title that the Railway Company took in the same category with the title granted to other Railroad Companies by other Special Congressional Grants.

It will also be further observed that the court held in that case that upon abandonment of the railroad the right-of-way would revert to the Creek Nation. Of course it will be remembered that Holdenville, Oklahoma, where the case arose, is in that part of the old Creek Nation which was not ceded to the United States as was the land in and about Oklahoma City. We believe that by applying the same principle, that inasmuch as the Creek Nation, by the Treaty of Jan. 19, 1889, ceded to the United States every right and claim to the land in Western Oklahoma, including the land in and about Oklahoma City and that involved in the instant cases, that upon abandonment of the right-of-way in the Country so ceded, the title to the right-of-way would revert to the United States. This, it will be observed, was the view that was taken by the State Supreme Court in its decisions in the instant cases.

Petitioners, at page 65 of their brief, cite without comment, *Northern Pac. Ry. Co.* v. *Townsend*, 190 U. S. 267, 23 Sup. Ct. 671, 47 L. Ed. 1044. This case is one of the outstanding cases in the United States on many of the material questions involved in the instant cases. We believe that if this case is followed there can be no question as to the correctness of the decisions of the State

Supreme Court. The case settles so many vital questions we shall, at the risk of being considered tedious, discuss it at length.

What were the facts and how does the law announced therein apply to the instant cases?

On July 2, 1864, Congress granted the Northern Pacific R. R. Company a right of way over the public lands of the United States located in the State of Minnesota. Subsequent to that date Townsend homesteaded a portion of the land over which the railroad company constructed its line of road. The Land Department of the United States issued a patent, as in the instant cases, purporting to convey the entire tract of land over which the railroad was constructed to Townsend, and made no exception or reservation as to the right-of-way; that is to say, the rights of the railroad company were entirely ignored by the Land Department, and no reference whatever was made to the railroad in the patent.

The railroad right-of-way across this land, as granted by Congress, was 400 feet in width, and of course, the principal portion of the right-of-way was not put to any use by the Railroad Company. Townsend, who had a patent to the land plowed up and cultivated that portion of the right-of-way which was not in actual use and continued to cultivate it under claim of ownership a sufficient number of years to give him title to it by adverse possession under the laws of the State of Minnesota. Townsend, the Homesteader, sold the tract of land for which he held the patent from the United States to Minerva Townsend, who continued to cultivate, use and occupy the land, just as the homesteader previously had.

In the course of time the Railroad Company made a demand for possession of that portion of the land which

was within the granted right-of-way and the demand was refused. The Railroad Company instituted a suit in ejectment in the state courts of Minnesota to recover the land. The defendant claimed title to the land by virtue of the patent and also by adverse possession. The trial court held in favor of the Railroad Company, but upon appeal, the Supreme Court of Minnesota held against the Railroad Company, reversed the case and ordered a new trial. (86 N. W. 1007)

On appeal to the Supreme Court of the United States Mr. Justice White, rendering the opinion of the court reversing the Supreme Court of Minnesota, said:

> "At the outset we premise that, as the grant of the right of way, * * * the land forming the right of way herein was taken out of the category of public lands subject to preemption and sale, and the *Land Department was therefore without authority to convey rights therein. It follows that the homesteaders acquired NO INTEREST in the land within the right of way because of the fact that the grant to them was of the full legal subdivisions.*" (Italics supplied).

The above holding is not susceptible to but one construction. It states in unmistakable language that as soon as the Act granting the right-of-way was passed the land forming the right-of-way ceased to be public lands and the *Land Department of the United States ceased to have authority to convey rights therein.* Moreover, the holding goes further and says that if the Land Department of the United States goes ahead under such circumstances and issues a patent broad enough in its terms to include the land embraced in the right-of-way, *the patentee acquires NO INTEREST in the land within the right-of-way by virtue of that patent.*

Where does this leave the petitioners in the instant cases? If the United States Land Department was without power and authority to grant an interest in the land involved in the instant cases where did petitioners acquire their interests? To ask these questions is to answer them.

The opinion in the *Townsend case* goes still further; and makes observations as to the character of title the Railroad Company took, and virtually assigns reasons for the zealousness on the part of Congress to see that no private individual acquires an interest in lands covered by such rights-of-way.

On this point the court among other things said:

> "* * * it must be held that the fee passed by the Grant made, * * *. In effect, the Grant was of a limited fee, made on an implied condition of reverter in the event that the Company ceased to use or retain the land for the purpose for which it was granted.
>
> "To repeat, the right-of-way was given in order that the obligations to the United States assumed in the acceptance of the Act, might be performed.
>
> "* * * As here, we find that the nature of the duties imposed by Congress in giving the right of way through the public domain are inconsistent with the power in an individual to acquire, for private purposes, by limitation, a portion of the right of way granted by Congress. The cases in question are inapposite."

In the last above quotation it will be observed that the court gave utterance to the following sentence:

> "In effect the Grant was of a limited fee, made on an implied condition of *reverter* in the event that the Company ceased to use" etc.

Our analysis of this case would be far from complete

should we not analyze and briefly discuss the import and meaning of this sentence. Notwithstanding its brevity and apparent simplicity, it speaks volumes and contains the fundamental underlying reason why it has always been utterly impossible for anyone to obtain an interest in a railroad right-of-way granted by Congress without an Act of Congress unmistakably authorizing a sale or other disposition thereof.

It will be noticed that the court said that the grant was "made on an implied condition of reverter." The question naturally arises—To whom shall it revert? Shall it revert in case of abandonment to some person like Townsend who held a patent, issued without authority by the Land Department of the United States, broad enough in its language to cover it? There can be but one answer to the question, and that is in the negative, for the court not only struck down Townsend's claim based on adverse possession, but also the claim predicated upon the patent, and held that a patent issued by the Land Department conveyed

> *"NO INTEREST in the land within the right-of-way"* (Italics supplied).

Then, to whom must it revert? To the United States, of course. That is exactly what the court said by the language just discussed. Although Townsend held a patent to the land from the Land Department of the United States, the court condemned the claim based thereon as well as the claim based on adverse possession and declared that the patent conveyed no interest in the land whatsoever. To have held that an interest was acquired by virtue of the patent would have destroyed the right of possibility of reverter in the United States. Such a holding would have been tantamount to saying

that a governmental agency, as the Land Department, acting in excess of its authority, could by such action destroy a right of the United States in land, and in such instances, as those under consideration, defeat the very object and purpose of the United States in keeping the rights-of-way granted by Congress intact.

Congress was endeavoring to promote the building of railroads and realized that one of the important factors in the construction of a railroad was a right-of-way; and the Supreme Court of the United States fully recognizing the object and purpose of Congress to promote the building of railroads in this Western Country, and also taking cognizance of the fact that the continuity of a right-of-way was what was necessary, and one of its chief values, early adopted the rule in construing these railroad right-of-way grants that no individual, except by express authority of Congress itself, could possibly acquire any interest in one of these railroad rights-of-way and that as soon as such a right-of-way was abandoned it immediately reverted to the United States where it could be disposed of only by Congress in such manner as it saw fit.

In *L. D. Holland Company* v. *Northern Pacific Railway Company*, 214 Fed. 920, the court said:

> "The value of a right-of-way is dependent upon its continuity, and surely it could not have been contemplated that in case of reversion the Government would get back only numerous disconnected fragments of that which it was granting as a continuous line."

Also the court in *St Joseph & Denver City R. R. Co.* v. *Baldwin*, 103 U. S. 426, 26 L. Ed. 578, said that con-

tinuity of railroad rights-of-way is chiefly what makes them valuable.

It was the *Townsend case,* together with some others that resulted in the Secretary of the Interior making his ruling in the *Cradall case,* 43 L. Dec. p. 556, and which later resulted in Cradall's procuring the passage of the private Act by Congress, authorizing the Secretary of the Interior to convey him a strip of abandoned railroad right-of-way over land to which he held a patent.

Petitioners at page 67 of their brief cite without comment *Rio Grande Western R. Co.* v. *Stringham,* 239 U. S. 44, 60 L. Ed. 136.

There is nothing in that case which could be construed by the greatest stretch of the imagination to conflict in any wise with the decisions of the state Supreme Court in the instant cases. In fact, the decision in that case is in exact harmony with the decisions of the state Supreme Court and is a strong authority in support thereof.

Where land has been once set apart for or appropriated to any particular purpose by Congress, the Land Department, in the absence of an Act of Congress, granting it clear and unmistakable power and authority so to do, has no authority to dispose of any remaining interest of the United States therein. This contention is not only strongly supported by the *Townsend case* discussed *supra,* but by many other cases, some of which are the following:

Salt Lake Investment Co. v. *Oregon Short Line R. R. Co.,* 246 U. S. 446, 62 L. Ed. 823;
Kansas City Pac. Ry. Co. v. *Dunmeyer,* 113 U. S. 629, 28 L. Ed. 1122;
Northern Pac. Ry. Co. v. *Ely,* 197 U. S. 1, 49 L. Ed. 639;
St. Louis Smelting etc. Co. v. *Kemp,* 104 U.

S. 636, 26 L. Ed. 875;
M. K. & T. Ry. Co. v. *Watson,* 74 Kas. 494, 87 Pac. 687;
Wilcox v. *Jackson,* 13 Peters 611, 10 L. Ed. 264;
Doolan v. *Carr,* 125 U. S. 618, 8 Sup. Ct. 1228, 31 L. Ed. 844;
R. Co. v. *Litchfield,* 23 Howard 66, 16 L. Ed. 500.

The title to a right-of-way granted by Congress passes as of the date of the Act.

St. Joseph & Denver City R. R. Co. v. *Baldwin,* 103 U. S. 426, 26 L. Ed. 578;
Bybee v. *Oregon & C. R. Co.,* 26 Fed. 586; and the same case, 139 U. S. 663, 35 L. Ed. 305;
Northern Pac. Ry. Co. v. *Ely,* 197 U. S. 1, 49 L. Ed. 639;
Stuart v. *Pac. R. R. Co.,* 178 Fed. 753;
Neilson v. *Northern Pac. Ry. Co.,* 184 Fed. 601;
Northern Pac. Ry. Co. v. *Hasse,* 197 U. S. 9, 49 L. Ed. 642;
Churchill v. *Choctaw R. R. Co.,* 4 Okla. 462, 46 Pac. 503.

Furthermore, a grant of a right-of-way between two fixed termini, is a law as well as a conveyance and all subsequent settlers must take notice thereof.

M. K. & T. R. R. Co. v. *Kansas Pac. R. R. Co.,* 97 U. S. 491, 24 L. Ed. 1095;
Schulenberg v. *Harriman,* 21 Wall. 44, 22 L. Ed. 555;
U. S. v. *Southern Pac. R. R. Co.,* 146 U. S. 570, 36 L. Ed. 1091;
Northern Pac. v. *Wadekamper* (Wash.) 126 Pac. 909;

Nadeau v. *Union Pac.*, 253 U. S. 446, 64 L. Ed. 1003;
Bybee v. *Oregon S. L. Co.*, 26 Fed. 586, 139 U. S. 663, 11 S. Ct. 641;

and many of the other cases herein cited.

Petitioners, at page 64 of their brief, call attention to *Denver & H. G. R. Co.* v. *Mills*, 222 Fed. 481. They say that the court in that case had before it the precise question involved in the cases at bar. In this the plaintiffs are very much in error.

That suit was between the railway company which had abandoned its right-of-way and a homestead settler or his successor in interest who had title to the abutting land on the right-of-way. Immediately after the railroad company abandoned the right-of-way, the plaintiff who owned the abutting land took possession of it under claim of absolute ownership, and after he had held the abandoned right-of-way for a period of time longer than is required in the State of Colorado to acquire title by adverse possession, the railway company decided that it would again take the abandoned right-of-way and use a part of it. Moreover, there was a special statute in Colorado which provided that when a railroad company abandoned a part of its line of road and established a new line, the old abandoned right-of-way should upon certain conditions go to the owners of the land through which it was granted.

The United States were not a party to the suit, nor was anyone a party who was standing in the shoes of the United States as to the ownership of the right-of-way, but the suit was between the railway company which had many years before abandoned the right-of-way and the owner of the abutting property.

Thus, it will be seen that there was really only one question involved and that was whether the railroad company had abandoned the right-of-way. If the railroad company had actually abandoned the right-of-way and the court so found, of course it had no standing in a court, as against the one who had been so long in peaceable possession, for the railway company could not disturb another's peaceable possession of land to which it had no title; and, especially in the face of the special statute of Colorado covering such situations. In other words, that suit might be likened unto one between A and B over land which belonged to C, who was not a party and had no knowledge of the suit.

So, it is patent that what the court said in that case relating to where the title to a right-of-way goes upon abandonment, is dictum of the plainest sort.

Petitioners, at page 65 of their brief, cite and discuss the case of *Crandall* v. *Goss* (Ida.) 167 Pac. 1025, as one which they say is quite similar to the cases at bar.

What we have just said relating to *Denver & R. G. Co.* v. *Mills, supra,* is equally applicable to this case. Not only is this true, but the court itself, in the case of *Crandall* v. *Goss, supra,* recognizes the fact in the opinion that it is only indulging in unnecessary comment when it discusses where the title to a right-of-way reverts upon abandonment; for the court used the following language:

> "• • • *However that may be, the title of the government is not here called in question.* Assuming that the abandoned portion of the right of way reverted to the United States and not to the owner of the land across which it was located the question presents itself; May one in possession of land, the ownership of which is in the United States, main-

tain an action to quiet his claim of title and right of possession as against third persons:

* * * *

"Following the doctrine announced in that case, we hold that this action may be maintained by respondent for the possession of the land in controversy and for the purpose of quieting his title thereto as against appellant." (Italics supplied.)

As further confirming the correctness of respondent's position, attention is called to the fact that notwithstanding that Crandall won the strip of abandoned right-of-way in the courts of Idaho as against Goss, yet he still had no title, for as a matter of fact upon the land being abandoned by the railroad company the title thereto reverted to the United States, and Crandall in order to get actual title to the land was compelled to go to the Congress of the United States and obtain the passage of a special Act authorizing the Secretary of the Interior to convey him this strip of land. (R. 78-83)

Petitioners at page 62 of their brief discuss at length some comments of the court in *Smith* v. *Townsend,* 148 U. S. 490. They italicize some of the remarks of the court in which the court stated in substance that upon abandonment of the particular right-of-way discussed in that case it would vest in the patentee of the land.

A mere casual glance at the case will show that the remarks of the court were not pertinent to any issue in the case. And the court itself recognized at the time of making the remarks quoted in the brief of petitioners that they were purely dictum, for the court continued with the following language:

"But whether this be so or not (meaning whether the right-of-way upon abandonment goes to abutting owners or not) it is enough that in the cession, in the act of Congress and the proclamation of the

> President the land was dealt with as an entirety, with certain metes and bounds, and it is that body of land thus bounded which all parties were forbidden to enter upon who desired thereafter to enter any portion as a homestead."

Furthermore, since the rendition of the decision in *Smith* v. *Townsend, supra,* the Supreme Court of the United States has ignored that dictum and made a contrary decision in a number of cases, to-wit:

> *Northern Pac. R. R. Co.* v. *Townsend,* 190 U. S. 267, 47 L. Ed. 1044;
>
> *Mackey, County Treas.* v. *Choctaw Okla. & Gulf R. R. Co.,* 261 Fed. 342, and 256 U. S. 531; 65 L. Ed. 1076;

and others which could be cited.

Both of the cases just cited have been hereinbefore discussed and we shall make no further comment, other than to say that the court in the *Mackey case* held that the right-of-way upon abandonment would revert to the Creek Nation. Of course in case of abandonment of the right-of-way in that part of the State ceded absolutely to the United States by the Creek Nation, such right-of-way upon abandonment would revert to the United States as was held in the opinions rendered by the state Supreme Court in the instant cases.

There are other cases cited under the same proposition in the brief of petitioners which are of like import as those above discussed and have no real application to any issue involved in the instant cases.

FOURTH PROPOSITION

Petitioners in their discussion of this Proposition endeavor to show abandonment and estoppel by reason of the fact that the Choctaw Coal & Railway Company re-

ceived deeds from the occupants of the right-of-way through what is now a portion of Oklahoma City. Petitioners say at page 69 of their brief that the railway company took deeds from private owners whose title rested on a patent from the United States.

It will be remembered that the record shows that the settlers in Oklahoma City, on the 22nd day of April, 1889, the day of the opening to white settlement, absolutely ignored and disregarded all claims of the Railway Company to the right-of-way. And it is also true that some of the citizens of Oklahoma City who were anxious to see the line of railroad constructed, procured deeds from the settlers for the right-of-way containing reversionary clauses, for which the settlers were paid by the citizens, but the Railway Company was all the time claiming a right-of-way under the Acts of Congress and refused to pay anything for such right-of-way.

This contention of petitioners presents no new question, for there are a number of cases which absolutely determine the question against the contention of Petitioners. In *Bybee* v. *Oregon & C. R. Co.* 26 Fed. 586, the Court had before it the precise question which is now under consideration.

Congress by Act approved July 25, 1866, granted a right of way over the public lands to the railroad company; and on the very next day Congress also granted to another party, a right of way over the same lands for a ditch. The railroad company did nothing to establish and construct its road before the year 1883, but the ditch was located and constructed in the year 1879.

It became necessary for the railroad company, in constructing its road in 1883, to cross the ditch, but the owner of the ditch refused to let the railroad company cross it. So, a controversy followed and the railroad

company finally acknowledged the claim of superior right of the owner of the ditch, and paid him $250 for a right of way over the ditch and took a deed which contained conditions obligating the railroad company in many ways. In the course of time, a lawsuit arose between the railroad company and the owner of the ditch. And it became necessary in the suit for the railroad company to attack the claim of prior right of the owner of the ditch and claim prior right for itself. Of course, when this position was taken by the railroad company, the owner of the ditch pleaded, as petitioners have in the instant cases, waiver and estoppel on the alleged ground that the railroad company by taking the deed acknowledged that the owner of the ditch had a superior right to the right of way.

These issues placed the question squarely before the court for decision as to whether even the railroad company itself could in that manner be estopped from claiming and be deprived of the benefits of the right of way expressly granted to it by Congress.

The court, after holding that when the railroad company took the deed from the owner of the ditch, it created the relation of vendor and vendee, used the following appropriate language:

> "It is a well established rule of law, that ordinarily, a vendee is under no obligation to support his vendor's title, and therefore, he is not estopped to deny the same."

And after discussing the question further, the court said:

> *"From the date of the definite location of the line of the defendant's road, the plaintiff had no right or easement to or in the land within the defendant's right of way, and was to all intents and*

purposes, a naked trespasser thereon. He never had anything to sell or convey to the defendant.

* * * *

"The defendant purchased the privilege of constructing and operating its road across and along the ditch for $250.00 and on the further condition that they would not thereby obstruct or impair the same. But, this condition or covenant being incident to and dependent upon the conveyance of some right in the premises to the defendant, if the latter is at liberty to show that nothing passed by such conveyance, the condition or covenant is left without consideration or support and falls to the ground.

* * * *

"But the plaintiff has really parted with nothing nor has the defendant obtained anything from him, although it has paid the plaintiff $250.00. The ditch was dug on what turned out to be the defendant's right of way land, and the plaintiff, in consenting to allow it to construct and operate its road there, *surrendered nothing to which it had any legal right. The conveyance was altogether an idle and superfluous act,* and whatever misapprehension of the parties as to their rights in the premises may have induced, in legal effect, it is a mere nullity." (Italics supplied).

It will also be remembered that this case was appealed to the Supreme Court of the United States and is reported in 139 U. S. 663, 35 L. Ed. 305.

In affirming the decision of the lower Court and discussing questions which we believe had a great deal more merit to them than any of the questions involved in the instant cases, the court used the following language:

"With regard to the question of estoppel, the *claimant alleges that the defendant went into possession* of that portion of the plaintiff's ditch across

which its road was constructed, under a deed from plaintiff and his tenant in common, for a consideration of $250.00 paid."

"* * * We have already found that the title of the Company to its right of way upon the location of its route related back to the date of the Act, and hence that when it took possession of the land in question plaintiff had no title thereto which he could set up against the company. Had the defendant not accepted the deed from the plaintiff, it might, under our ruling upon the first point, have treated him as a trespasser. The real question then is, whether the defendant is placed in a worse position by having accepted the deed from a party who had no title to the premises he assumed to convey— the defendant having taken the conveyance under a mistaken view of the law applicable to the case."

* * * *

"If, as we hold, the defendant had the prior right to this land, it was under no obligation to treat with the plaintiff to pay him for the disturbance of his possession which was unlawful as against the company. Has it by this deed disqualified itself forever from asserting the right that it would have possessed had it not done this? We think not."

* * * *

"We do not consider it a breach of good faith upon the part of the defendant to set up this fact; (meaning claim of prior right) *nor ought it to be put in a worse position by having accepted this deed and* $250.00 *therefor, than it would have occupied had it refused altogether to treat with the plaintiff.*"

"And it would be manifestly unjust to hold the defendant forever estopped from asserting the invalidity of the covenant into which it had inadvertently entered." (Italics supplied).

It is difficult for us to conceive how language could be much stronger than that contained in the decisions of the above case. And, it should be borne in mind that it was the railroad company itself pleading its prior rights, and not some person, who had succeeded not only to the rights of the railroad company, but also to the rights of the United States, as in the instant cases.

In *Oregon Short Line R. R.* v. *Quigley,* 10 Ida. 770, 80 Pac. 401, it was sought to invoke abandonment, waiver and estoppel against the Railroad Company which took deeds from settlers on the right of way, but the Court refused to sustain such contentions.

The court, in discussing the questions, said:

> "The grantors have lost nothing by the transaction, nor have they been prejudiced in any of their rights or lulled to repose by any act of the grantee. On the contrary, they have benefited by the transaction to the extent of the purchase price which they received for the execution of the quit-claim deeds."

And the court after further holding that Congress granted the right of way to the railroad company in fee for a certain purpose, and that the company could not convey it, said:

> *"And if it could not do so, (convey) by solemn grant, it certainly could not do so, by an act which might be construed into a recognition of adverse possession."* (Italics supplied).

When a right of way is granted to a railroad company by Congress over the lands of the United States and the railroad company undertakes to build the road, and does build it under the terms of the grant, the title to the right of way cannot be lost to any in-

dividual by any action or lack of action on the part of the railroad company. The railroad company is as powerless to give title or to throw the title away to an individual and thereby defeat the terms of the Act and the purpose that Congress had in granting the right of way, as an individual himself would be to acquire title to property of the United States without the authority of Congress.

Another late and clear expression of the courts upon the proposition is contained in the case of *Barnes and Mulvihill* v. *Southern Pacific R. Co.*, 16 Fed. (2d) 100. The railroad company in that case had been granted a right of way 200 feet in width, over the public lands; and when it attempted to locate and construct its road, it had trouble with Barnes and Mulvihill, settlers on some of the land. A settlement was finally made and the railroad company paid for a right of way 100 feet in width and took deeds from Barnes and Mulvihill. The company also made maps showing its right of way to be only 100 feet in width through this land instead of 200 feet.

In after years, the railroad company brought suit to recover the full 200 feet of right of way granted by Congress; and Barnes and Mulvihill virtually made the same claims that are being made in the instant cases.

The trial court even refused to permit Barnes and Mulvihill to introduce the deeds and maps in evidence, and rendered judgment for the railroad company.

The opinion of the court affirming the judgment of the trial court is very instructive. However, we shall only quote the plain rule laid down by the court as follows:

"Neither the acts nor the acquiescence of the

grantee of the government can operate to defeat the will of the grantor."

Union Pac. Ry. Co. v. *City of Greeley,* 189 Fed. 1, is another case where deeds were taken from settlers who contested the rights of the Railroad Company. The railroad company in that case when a controversy arose as to its right of way, consented to take a very narrow strip for a right of way through the town for which it took deeds containing unusual conditions and provisions from those claiming to own the title. The railroad company never even laid claim to the right of way 400 feet in width, which was the width granted by Congress. Moreover, the company recognized the city as being the owner of the streets and alleys, as shown on the town plat, running across the land being procured for right of way purposes and obtained its consent to use such streets and alleys. And furthermore, the railroad company not only failed to lay claim to the full 400 feet of right of way through the town it tacitly and expressly in almost every conceivable manner gave full recognition of the claim of title by those who claimed to own that portion of the 400-foot strip not claimed nor used by the railroad company for right of way purposes. This action and conduct on the part of the railroad company continued throughout a period of 40 years. It had seen the occupants of this land spend fortunes on it in the way of permanent improvements. In fact, the land had been held so long and had become so valuable on account of the thrift and industry of those who had lived upon it that it would seem inconscionable to permit anyone to take this land away from them. But notwithstanding this situation, when the railroad company changed hands, it attacked the title of those who were within the 400 feet and they found themselves without any defense, even as against

the railroad company. This decision, while one greatly affecting thousands of people throughout many of the western states stands now as the settled law and has not been criticised as being unsound in principle.

So widespread were the effects of the decision in the *Greeley Case,* that even Congress, not in a spirit of criticism of the decision and the decisions of the Supreme Court of the United States upon which it was based, but with a full recognition of the correctness and soundness of the decision and in the exercise of its absolute power and control over such rights of way, passed the Norris Act, ((37 Stats., 138) in order to relieve the people, not only from the hardships of this particular decision but from many other cases involving similar situations.

The report of the Congressional Committee on the Judiciary on the Norris Act is very illuminating. (R. 61-77).

Petitioners also claim in their brief at page 69, that the final location of the line of railroad through Oklahoma City was not on the survey as originally made. That is true as to the land involved in the Higgins case, but as to the land involved in the Noble case, it will be remembered that the survey was never changed. Previous to the day of the opening on the 22nd of April, 1889, there had been a temporary survey of the right of way made and stakes driven showing its temporary location; and, on the day of the opening the right of way over the Noble land was indicated by stakes, markers and signs, showing that it was claimed for a railroad right of way. But notwithstanding this, the ancestors of petitioners Noble, ignored the claim of the railroad company and settled on the land, so the ancestors in the Noble case, not only had constructive notice of the claim

of the railway company, but they had actual notice thereof.

But it was not even necessary that anything be done by the railway company before the opening in order for it to obtain its right of way. That has been decided many times in the various cases hereinbefore discussed. Furthermore, the fact that the railway company in its final location of the road, varied from the temporary survey in some places is entirely immaterial. It will be observed in this connection that petitioners in their brief failed to cite any authority showing that the variance was fatal. Moreover, it will be remembered that the road as actually constructed was duly approved by an Act of Congress in 1896, and was later approved by the Secretary of the Interior.

Some of the cases in which it has been held that a variance from the temporary survey was permissible, are as follows:

Stuart v. *Pac. R. R. Co.*, 178 Fed. 753;
Neilson v. *Northern Pac. Ry. Co.*, 184 Fed. 601;
Union Pac. R. Co. v. *Hegger* (Kan.) 204 Pac. 1008;
United States Ex rel. Search, v. *C. O. & G. R. R. Co.*, 3 Okla. 404, 41 Pac. 729.

(Holding that the filing of a map was not necessary under the Acts involved, and that a change in the temporary survey was permissible.)

No map was required. The construction of the line of railroad was all that was necessary.

Jamestown v. *Jones*, 117 U. S. 628, 44 L. Ed. 698;
Union Pacific v. *City of Greeley*, 189 Fed. 1;

Stuart v. *Union Pacific,* 227 U. S. 342, 57 L. Ed. 535;
City of Reno v. *Southern Pacific,* 268 Fed. 751;
Minn., etc., v. *Doughty,* 208 U. S. 251, 52 L. Ed. 474.

FIFTH PROPOSITION

Petitioners at pages 71 and 72 of their brief attempt to show that the Act of March 8, 1922, 42 Stats. 414, providing for the disposition of abandoned or forfeited railroad rights-of-way, granted by Congress, has no application to the land involved in the Higgins case. The Act is set forth at page 87 of the printed record and the petitioners claim that because the Act provides that the title to the abandoned railroad right of way shall "vest in such municipality, and this by virtue of the patent thereto, and without the necessity of any other or further conveyance or assurance of any kind or nature whatsoever," it can not have any application to the Higgins land because the Higgins land was patented direct to R. W. Higgins, one of the ancestors of petitioners. This portion of the Act has never been construed by any Court, insofar as we have been able to learn, but we believe it is patent that the claim of petitioners is wholly unfounded. Congress, in line with all the decisions of the Supreme Court of the United States, and other Courts where the question has been involved, clearly recognized the title of the United States to all abandoned railroad rights of way where such rights of way were obtained by and through Acts of Congress.

Congress, by this Act, doubtless intended to make full provision as to where the title to such rights of way should vest upon abandonment; and in making this disposition Congress provided in the Act that such abandoned rights

of way in rural communities, should vest in the owner of the property out of which it was carved. And that in municipalities the title to such abandoned rights of way should vest in the municipality in which the right of way was located for park purposes.

There is no escape from the conclusion that there is no possible way by which a private individual can procure title to such an abandoned right of way in a municipality. If the Act of Congress does not apply to the abandoned right of way in the City of Oklahoma City, it is certain that the title thereto still belongs to the United States because it is clear Congress did not make provision for any private individual in a municipality to succeed to such an abandoned right-of-way. On the contrary, the Act itself unmistakably shows that Congress intended for the municipality to succeed to an abandoned right-of-way within its corporate limits.

The contention of Petitioners is a mere play upon words which is neither sound in law nor in fact. It is the intention of law making bodies which govern in the interpretation of their enactments, and the gist of the statute under consideration, stripped of all technicalities, is that the title to an abandoned right-of-way located outside of municipalities shall go to the owner of the property out of which the right-of-way was taken; and in municipalities, the title to such rights of way shall vest in the municipalities, without the necessity of the execution of a patent therefor or other assurance.

While this Act has never been construed, we believe the intent and purpose of it is so plain that there can be no mistake as to what Congress intended. If the technical wording of the clause relied on by petitioners is such that it destroys the applicability of the Act to the situation involved in the instant cases as contended by them, certainly

a court would not be justified in holding that the Petitioners could in anywise reap a benefit therefrom, for in such a situation the title to the abandoned right-of-way would still be vested in the United States free from any claim of Petitioners. They must recover on the strength of their own title and not on the weakness of Respondent's title.

The report of Committee on Public Lands which contains copies of letters from the Secretary of the Interior relating to abandoned Railroad rights-of-way and a statement of the reasons why the Act of March 8, 1922 should be passed, is very illuminating and is set out in full at pages 77-86 of the printed Record.

Also, as further showing the absolute power and control of the United States over all rights of way granted to railroad companies, attention is called to some of the Acts of Congress which had previously been passed. These Acts are set forth in stipulation shown at page 51 of the printed Record, among which is the Norris Act herein before referred to.

Ruff v. *Board of Commissioners* (Kans.) 272 Pac. 189, decided December 8, 1928, is a very illuminating case on the power of Congress over rights of way granted by it. It will be observed that the case reviews a great deal of the legislation enacted by Congress relating to the disposition of rights of way. Under all the authorities Congress is the only body which can authorize the sale or disposition of a right of way granted by it; and the abutting property owners can not be heard to complain, for they have no interest whatsoever in such rights of way, notwithstanding the patent they hold to the land through which the railroad runs may be broad enough in its terms to include the right-of-way.

Of course, since the passage of the Act of March 8, 1922, if the abandoned right of way is in a rural community, it

reverts to the owner of the land out of which it was taken, but if it is within a municipality it goes to the municipality for park purposes.

The Respondent in the instant cases, now holds and uses the land in controversy for public park purposes.

SIXTH PROPOSITION

The decisions of the Supreme Court of the State of Oklahoma in the instant cases are fully sustained by the controlling statutes and authorities.

We believe we have herein before successfully answered every point of contention made by petitioners. In our discussion we have cited and discussed many authorities, all of which we believe to be applicable to the issues in the instant cases; but notwithstanding the great number of authorities cited and discussed, we confidently believe that it can be easily determined by examining certain statutes and authorities we have selected from the great mass, that the opinions of the State Supreme Court in the instant cases could not have been otherwise than as written.

So, in the light of our discussion of other Propositions herein, we have selected and tabulated what we deem to be the governing and controlling treaties, statutes and cases. We list them as follows:

1. Controlling Treaties and Statutes.

Creek and Seminole Treaty of August 7, 1856—11 Stats. 699, 2 Kappler 756, (authorized among other things, granting of Railroad rights of way.)

Creek Treaty of June 14, 1866. 14 Stats. 785, 1 Kap-

pler 931, (ceded all this land to United States and also authorized granting of Railroad rights of way over all Creek lands.)

Creek Treaty of January 19, 1889, and approved by Congress March 1, 1889, 25 Stats. 757, 1 Kappler 321, (ceded all claim and granted unrestricted use to United States.)

Choctaw Railway Act—Passed *Feb.* 18, 1888. 25 Stats. 35, 1 Kappler 256, Amended *Feb.* 13, 1889, 25 Stats. 668, 1 Kappler 311.

Act authorizing opening of Country for Settlement, passed *March* 2, 1889, 25 Stats. 980, 1 Kappler 340.

President's Proclamation Opening Country for Settlement, Issued March 23, 1889—25 Stats. 1544, 1 Kappler 940.

Organic Act—Passed *May* 2, 1890. 26 Stats. 81.

Act of April 24, 1896, Approving construction of Railroad, 29 Stats. 98.

Act of March 8, 1922—Disposing of abandoned railroad Rights of Way. 42 Stats. 414

2. Controlling Cases.

Ruddy v. *Rossi,* 248 U. S. 104, 63 L. Ed. 148;

United States ex rel. Search et al. v. *Choctaw Okla. & Gulf Ry. Co.,* 3 Okla. 404, 41 P. 729;

Stuart v. *Pacific R. R. Co.,* 178 Fed. 753;

Churchill v. *Choctaw Coal & Ry. Co.,* 4 Okla. 462, 46 P. 503;

St. Joseph & Denver R. R. Co. v. *Baldwin,* 103 U. S. 426, 26 L. Ed. 578;

Northern Pacific R. Co. v. *Townsend,* 190 U. S. 267, 47 L. Ed. 1044;

Rio Grande R. R. Co. v. *Stringham,* 239 U. S. 44, 60 L. Ed. 136;

Mackey, County Treasurer, v. *Choctaw Okla. & G. R. Co.,* 256 U. S. 531, 65 L. Ed. 1076;

Bybee v. *Oregon & Cal. R. Co.,* 139 U. S. 663, 35 L. Ed. 305.

Some of the above cases have been declared the law for more than fifty years, and yet there is not a single one of them which has ever been criticised in the slightest degree; on the other hand some of them have been cited with approval and followed scores of times.

In the light of all the authorities, we submit that the opinions of the State Supreme Court contain a true and correct statement of the law.

SUMMARY AND CONCLUSION

We confidently believe that we have successfully shown that the writs prayed for herein should be denied for the following reasons, towit:

1. Because the opinions of the State Supreme Court not only gave full force and effect to all pertinent federal statutes, but are fully sustained by all the controlling statutes and decisions.

2. Because in the Higgins case there is a non-federal question which is sufficient to sustain the decisions of the Supreme Court of the State of Oklahoma insofar as they relate to that case. Said non-federal question being predicated upon the deed executed by R. W. Higgins and wife in 1898, conveying the land in fee simple to the Choctaw Oklahoma and Gulf Railroad Company, the successor of the Choctaw Coal and Railway Company.

3. Because the major portion of the petition and the brief in support thereof is not at all applicable to the Noble case in that the ancestors of the Noble petitioners settled upon the land in controversy with full knowledge of the fact that the Choctaw Coal & Railway Company claimed said particular land for right-of-way purposes.

4. Because it is patent that there is no error in the opinions of the State Supreme Court and that such opinions should be promptly fully approved and affirmed in all particulars.

Respectfully submitted,

HARLAN T. DEUPREE,
Municipal Counselor,

J. H. JARMAN,
W. H. BROWN,

Attorneys for Respondent.

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In the Supreme Court of the United States

No. 335

GEORGE NOBLE and WILLIAM NOBLE,
Petitioners,

vs.

THE CITY OF OKLAHOMA CITY, a Municipal Corporation,
Respondent.

No. 336

ROBERT W. HIGGINS, Jr., et al.,
Petitioners,

vs.

THE CITY OF OKLAHOMA CITY, a Municipal Corporation,
Respondent.

Supplemental Brief in Behalf of Respondent

HARLAN T. DEUPREE,
Municipal Counselor,

J. H. JARMAN,
W. H. BROWN,
Attorneys for Respondent.

HARLOW PUBLISHING CORP., OKLAHOMA CITY

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Respondent.

Supplemental Brief in Behalf of Respondent

In the respondent's original brief, filed as a portion of the Response to the Petition for Writs of Certiorari, the respondent, as we believe, discussed every material question involved in these cases; and we believe that our position on all such issues is absolutely sound and fully sustained by the authorities. We now rely upon that brief. However, since filing that brief, we see where our argument relating to one of the most vital issues can be materially supplemented and very much strengthened

by calling the court's attention to some additional facts and authorities which we believe are absolutely conclusive on the question, and should be considered along with our original brief.

The character of title that the Choctaw Coal & Railway Company acquired by virtue of the Acts of Congress granting the right-of-way, February 18, 1888, 25 Stats. 35, (R. 26) as amended by the Act of February 13, 1889, 25 Stats. 668, (R. 32) is a very vital question.

It will be remembered that the petitioners claim that these Acts of Congress were not a grant in praesenti of a right-of-way to the Choctaw Coal & Railway Company. On the other hand, the respondent contends that these Acts constituted a Grant in praesenti of a right-of-way; and, also further contends that even if it should be held that the above mentioned Acts of Congress were not a grant in praesenti, of a right-of-way, still the Act of Congress of March 2, 1889, 25 Stats. 980, authorizing the Country to be opened to White settlement and reserving railroad rights-of-way was sufficient within itself to grant the right-of-way to the Choctaw Coal & Railway Company. We discussed this question in our original brief, beginning at page 16 and continuing to page 29 thereof, under what we designated "First Proposition," which is as follows:

"The Act of Congress of Feb. 18, 1888, as amended by the Act of Feb. 13, 1889, was a Grant in praesenti of a right-of-way to the Choctaw Coal & Railway Company."

It will be remembered that petitioners' contention that the Choctaw Coal & Railway Company was not granted

a right-of-way in praesenti is predicated upon their claim that the lands over which the right-of-way was granted were Indian lands and that by reason thereof the Congress of the United States had no authority to grant such a right-of-way. Notwithstanding that petitioners are in gross error as to their assertion that the Creek Tribe of Indians had title to the land in and about what is now Oklahoma City, at the time of the passage of said Acts, we call the court's attention to the following Treaty provisions relating to railroad rights-of-way.

On August 7th, 1856, 11 Stats. 699, 2 Kapp. 756, the Creek and Seminole Tribes of Indians and the United States entered into a Treaty relating to their lands, and it was specially provided in Art. 20 of said Treaty, as follows:

> "Article 20. The United States, or any incorporated company, shall have the right of way for railroads, or lines of telegraphs, through the Creek and Seminole countries; but in the case of any incorporated company, it shall have such right of way only upon such terms, and payment of such amount to the Creeks and Seminoles, as the case may be, as may be agreed upon between it and the national council thereof; or, in case of disagreement by making full compensation, not only to individual parties injured, but also to the tribe for the right of way, all damage and injury done to be ascertained and determined in such manner as the President of the United States shall direct."

On June 14, 1866, the United States and the Creek Tribe of Indians entered into a Treaty, 14 Stats. 785, (R. 52) whereby the United States procured title to all the Western portion of the Creek lands, including all the lands in and about Oklahoma City and the land involved

in the instant cases. The granting clause of said Treaty, as is set forth in Art. 3 thereof, is as follows:

> "In compliance with the desire of the United States to locate other Indians and freedmen thereon, the Creeks *hereby cede and convey to the United States, to be sold to and used as homes for such other civilized Indians as the United States may choose to settle thereon,* the west half of their entire domain, to be divided by a line running north and south; the eastern half of said Creek lands being retained by them shall, except as herein otherwise stipulated, be forever set apart as a home for said Creek Nation; * * *." (Italics supplied).

And Article 5 of the same Treaty contains the following provision:

> "The Creek Nation hereby grant a right-of-way through their lands, to the Choctaw and Chickasaw country, to any company which shall be duly authorized by Congress, and shall, with the express consent and approbation of the Secretary of the Interior, undertake to construct a railroad from any point north of to any point in or south of the Creek country, and likewise from any point on their eastern to their western or southern boundary, but said railroad company, together with all its agents and employees, shall be subject to the laws of the United States relating to intercourse with Indian tribes, * * *."

The above Treaty provisions conclusively show two things:

First, that the West half of the entire domain of the Creek Nation was ceded or granted to the United States by the Treaty dated June 14, 1866; and said "west half of the entire domain" included all lands in and about Oklahoma City. Attention is also called to the further

important fact that after the Treaty dated June 14, 1866, neither the Creek Indians nor any other people were ever permitted to settle upon or occupy any of the lands in and about Oklahoma City before the passage of the Act of March 2, 1889, authorizing the Country to be opened by Proclamation of the President, to White settlement.

Second, that the United States were fully vested with authority to grant railroad rights-of-way even across lands which the Creek Indians actually owned and occupied; and, of course the United States had the right without consulting anyone, to grant a right-of-way across the land that they had purchased from the Creek Indians under and by virtue of said Treaty of June 14, 1866. Also, it will be remembered that after the Treaty of June 14, 1866, the Creek Indians still owned the eastern portion of their lands and continued to own same until such lands were allotted in severalty under the laws of Congress.

By tracing the right-of-way granted by the Acts of Congress above mentioned, it will be observed that the right-of-way extended across a portion of the lands belonging to the Chickasaw and Choctaw Tribes of Indians, and by following the right-of-way granted in the Amendatory Act of Feb. 13, 1889, (R. 33), from Tobucksey County, Choctaw Nation (near what is now Haileyville, Oklahoma) "by the most feasible and practical route, to an intersection with the Atchison-Topeka & Santa Fe Railway, at the most convenient point between Halifax Station (now Goodwin in Ellis County, Oklahoma) and Ear Creek, otherwise known as the North Fork of the Canadian River," it will be observed that the right-of-way crossed a portion of the Choctaw Nation and extended through the lands still belonging to the Creek Nation

and then intersected the lands owned by the United States by virtue of the said Treaty of June 14, 1866. In this connection, attention is called to the further fact that at least two-thirds of the right-of-way thus described was on the land which had been ceded by the Creek Tribe of Indians to the United States under the last mentioned Treaty. In fact, this right-of-way extended from east to west almost entirely across what was later organized into Oklahoma Territory; and, at the time of the grant of right-of-way all of such lands were unoccupied and owned by the United States, except in a few instances where the United States had previously settled certain Indian Tribes. But, as above shown, at no time had the United States made any disposition of or permitted anyone to settle upon the lands in and about Oklahoma City before they were opened to White settlement.

After the United States had owned the land obtained from the Creek Tribe of Indians for about 19 years, without making use of any substantial portion of it, Congress came to the conclusion that it should be opened to white settlement. Preparatory to the opening of the country to white settlement, Congress on March 3, 1885, (23 Stats. 62), passed an Act authorizing negotiations with the Creek Tribe of Indians to effect a release of the restrictions as to the use which the United States might make of such lands.

As a result of the negotiations authorized by said Act, the United States entered into a Treaty with the Creek Indians, dated January 19, 1889, which was ratified and approved by the Creek Tribe January 31, 1889, and finally ratified by Congress March 1, 1889 (25 Stats. 757), which was the day before the Act was passed authorizing the country to be opened to white settlement. In

this last mentioned Treaty, the Creek Tribe relinquished and transferred to the United States all claim of every character to this western land and absolutely freed said land from all limitations or restrictions as to the use which might be made of it by the United States.

So, when the right-of-way Act of Feb. 18, 1888 as amended by Act of Feb. 13, 1889, was passed, Congress not only had the power under the Treaty provisions above mentioned to grant the right-of-way through the lands which were actually owned by the Creek Nation, but it actually owned and was preparing to open this western country in and about Oklahoma City to white settlement, and of course had the right to grant a right-of-way through such lands.

Ruddy v. *Rossi*, 248 U. S. 104, 63 L. Ed. 148.

We submit that in view of the above uncontroverted facts, laws of Congress and Treaty provisions, all the arguments of petitioners questioning the power of Congress to grant the right-of-way unquestionably falls, for there is no foundation, either in fact or in law, for such contention.

But the Choctaw Coal & Railway Company did not have to rely alone upon the Acts of Feb. 18, 1888 as amended by the Act of Feb. 13, 1889, for its right-of-way, for as above shown, on March 2, 1889, Congress passed an Act authorizing the opening of the country to white settlement; and, in that Act, rights-of-way and depot grounds previously granted to railroads were expressly reserved to railroads as more fully appears at page 24 of respondent's original brief; and, furthermore, Congress, on May 2, 1890, in what is commonly called the Organic Act, expressly reserved from the operation there-

of: "Rights-of-way and lands for stations heretofore granted to certain railroad corporations" as also more fully appears at page 25 of the same brief.

Even if Congress had been without authority to grant the right-of-way at the time the Choctaw Coal & Railway Company Acts were passed, which we submit is inconceivable under the circumstances, it most certainly had the power to grant such a right-of-way in the Act of March 2, 1889; and Congress certainly believed that there had been rights-of-way granted prior to the enactment of March 2, 1889, and the Act of May 2, 1890, or it would not have referred to said rights-of-way grants in said Acts. Furthermore, if Congress could not grant a right-of-way to the Choctaw Coal & Railway Company, for the reasons urged by the petitioners, it could not for the same reason grant a right-of-way to any other Railway Company. Consequently, if petitioners contentions should be true, when Congress was referring to right-of-way grants in the Acts of March 2, 1889, and May 2, 1890, it was making reference to a thing which in fact did not exist. Congress most certainly accepted the fact and believed that rights-of-way had been previously granted.

Even if the Creek Tribe of Indians had been vested with the title to this land, at the time of the passage of the Acts of Feb. 18, 1888, as amended by the Act of Feb. 13, 1889, still that fact would not prevent the Grant in praesenti of the right-of-way to the Choctaw Coal & Railway Company.

The decisions of this court fully sustain this Proposition. But inasmuch as the cases referred to conclusively answer a criticism made by the petitioners in their Reply

Brief, we shall refer to such criticism before citing the cases. At page 11 of said Reply Brief, petitioners say we did not quote all of Article 20 of the Creek and Seminole Treaty of August 7th, 1856, 11 Stats. 699. Their criticism is that we stopped short of the provision in the Treaty which required compensation to be "determined in such manner as the President of the United States should direct."

We have hereinbefore set forth all of said Article 20, but the fact that the Indian Tribe owned an interest in some of the lands over which the right-of-way was granted, and that said Article 20 provided that compensation should be made to the Indians, did not in the least militate against the fact that the Choctaw Coal & Railway Company was granted a right-of-way in praesenti; and, as above stated, this court has so held in a case where the facts were not nearly so favorable to that contention as in the instant cases. We have in mind *Spokane & British Coal & Railway Co.* v. *Washington & Great Northern Railway Co.*, 219 U. S. 166, 55 L. Ed. 159.

In that case Congress, June 4, 1898, 30 Stats. 430, granted to Washington Improvement & Development Co. a right-of-way for a railway through the Colville Indian Reservation; and the Act granting the right-of-way provided in Section 2 thereof, as follows:

> "That it shall be the duty of the Secretary of the Interior to fix the amount of compensation to be paid to any Indian Allottees whose lands may be taken by said Company under this Act and to provide the time and manner of payment thereof."

It will be observed that the Colville Indians were even allottees and actually lived on the land over which the right-of-way was granted, but notwithstanding this situa-

tion, this court held in the case just cited that the Act of Congress conveyed to the Company an estate in praesenti.

In *Butts* v. *Northern Pac. R. R. Co.*, 119 U. S. 55, 30 L. Ed. 330, the court had before it an Act of Congress approved July 2, 1864, 13 Stats. 365, granting certain lands to which the Indians had title to the Northern Pacific R. R. Co., and the court held that notwithstanding that the title was in the Indians at the time of the passage of the Act, it constituted a conveyance of an estate in praesenti. One of the head notes in the case prepared by MR. JUSTICE FIELDS is as follows;

> "The grant by the Act of Congress of July 2, 1864, to the Northern Pacific Railroad Company, of lands to which the Indian title had not been extinguished operated to convey the fee to the Company, subject to the right of occupancy by the Indians."

The fact that the Choctaw Coal & Railway Company Acts designated who should be paid compensation shows conclusively that Congress did not intend for the Railway Company to pay compensation to others than those specified.

This proposition is amply sustained by the following cases: In *City of Reno* v. *Southern Pac. Co.*, 268 Fed. 751, the court had under consideration a right-of-way grant which made no provision for compensating those who had previously settled upon the public lands over which the right-of-way was granted and the court in holding that inasmuch as no provision had been made for compensating such settlers they were not entitled to claim anything from the Railroad Company. In discussing the

question the court used the following language, at page 760 of the opinion:

> "The Act of 1862, was silent as to any method under which possessory claims of settlers could be condemned or acquired by the Railroad Company * * *. There were no rights which the Government was under obligation to recognize, if, in the opinion of Congress public welfare required disposition without relation to possible claims of settlers."

And in support of this language the court cited *St. Jos. & Denver Co.* v. *Baldwin*, 103 U. S. 426, 26 L. Ed. 578. In fact the decision of the Ninth Circuit Court of Appeals in *City of Reno* v. *Southern Pac. Co., supra,* furnishes a very illuminating review of many of the leading cases on rights-of-way granted by Congress.

And the Ninth Circuit Court of Appeals in *U. S.* v. *Hanson,* 167 Fed. 881, held substantially the same as the case last cited. See also *Union Pac. Ry. Co.* v. *Douglas Co.,* 31 Fed. 540.

Furthermore, when it is recalled that a special Act of Congress granting a right-of-way between fixed termini to a Railroad Company operates as a law as well as a transfer of property as held in *Schulenberg* v. *Harriman,* 21 Wall. 44, 22 L. Ed. 555; *M. K. & T. R. R. Co.* v. *Kans. Pac. R. Co.,* 97 U. S. 491, 24 L. Ed. 1095; *U. S.* v. *So. Pac. R. R. Co,* 146 U. S. 570, 36 L. Ed. 1091; *Bybee* v. *Oregon S. L. Co.,* 26 Fed. 586, 139 U. S. 663, 35 L. Ed. 305, and other cases, we can not conceive how new terms can be engrafted into the contract with the Choctaw Coal & Railway Company so as to require it to compensate others than the Indian occupants as specified in the grant.

It will be remembered that the Choctaw Coal & Ry. Co.

fully complied with the Act of Congress, but petitioners are not willing to let the railway company stand on the terms of the Act granting it the right-of-way. But, after those particularly designated in the Choctaw Coal & Railway Company right-of-way Act as being entitled to the compensation have been either paid or eliminated, petitioners insist that the railway company should be required to discharge other and additional burdens than those specifically placed upon it by the Act itself. However, petitioners cite no case which sustains their contention, in this regard.

By the very terms of the Act itself, the Choctaw Coal & Railway Company was only required to pay damages to the Indian Tribe or Nation through whose territory it ran, and "to any individual occupant according to the laws, customs and usages of any of the Indian Nations or Tribes" whose possessory rights and improvements might be injured and damaged in the construction of said road.

The Choctaw Act does not provide any compensation to the United States although the United States owned the title to the major portion of the land, over which the right-of-way was granted and particularly the land in and about Oklahoma City, and owned a substantial interest in the rest of the land through which the right-of-way was granted. Nor, did the Act provide that any person who should subsequently be permitted to enter into the country, as the ancestors of petitioners in the instant cases, should receive compensation for the land or improvements thereon over which the railroad company desired to locate its line. We believe that only one conclusion can be drawn from this silence in the Act, and that is, that the Congress of the United States intended

to grant a free and unconditional right-of-way to the Choctaw Coal & Railway Company as it had done in hundreds of other instances, save and except where such right-of-way affected Indian rights, and in such cases the railway company was required to make compensation for such Indian rights and no others. We believe that this conclusion is not only justified from the terms and provisions of the Act itself, as interpreted in the light of subsequent Acts of Congress herein before discussed, but that this conclusion is strongly supported by the many decisions of this court involving right-of-way grants.

All the court decisions relating to the interpretation of the Choctaw Coal & Railway Company act involved in the instant cases have been called to the attention of the court. We are not advised as to how much consideration this court gives to opinions of the Department of the Interior of the United States, but on March 27th, 1934, the Department of the Interior had before it for consideration, and rendered an opinion on a question which called for the interpretation of this same Choctaw Coal and Railway Company right-of-way grant as the same related to the right-of-way across a quarter section of land immediately east of and adjoining the quarter section of land in which the property involved in this litigation is located; and the construction which was placed upon that right-of-way grant by the Department of the Interior is in perfect accord with respondent's contentions in the instant cases, and the opinion of the Supreme Court of the State of Oklahoma attacked herein.

Inasmuch as we are not advised as to whether this opinion is in any published report, we shall set forth the entire opinion as an appendix to this brief, for the

court's inspection. However, at this time we desire to call the court's special attention to a certain portion of the opinion, as follows:

> "The act of February 18, 1888, granting the right of way 100 feet in width to the Choctaw Coal and Railway Company was a *special grant similar to other special grants of railroad rights of way, which have been held to be grants in praesenti, effective at the date of the granting act, so that adverse claims initiated subsequent to the granting act, but prior to the filing of the map of definite location or construction of the road, do not affect the rights of the railroad grantee.* See St. Joseph and Denver City Railroad Company v. Baldwin, (103 U. S. 426); Bybe v. Oregon and California Railroad Co. (139 U. S. 663); Northern Pacific Railway Company v. Ely (197 U. S. 1). For other Federal cases see 50 C. J. Sec. 427. The Supreme Court of Oklahoma has held the grant under consideration was a grant in praesenti and that title vested in the grantee at the date of the act. United States v. Choctaw, O. & G. Co. (41 Pac. 729); Churchill v. Choctaw Ry. Co. (46 Pac. 503).
>
> "As to the nature of the estate acquired by the grantee in the right of way, the Supreme Court has held, in accordance with its construction of other grants of rights of way under the public land laws for railroad purposes, that the railroad's interest is 'neither a mere easement, nor a fee simple absolute, but a limited fee, made on the implied condition of reverter in the event that the company ceases to use or retain the land for the purposes for which it is granted, and carries with it the incidents and remedies usually attending the fee;' that 'in effect, the railroad is the absolute owner of the land.' Choctaw, O. & G. R. R. Co. v. Mackey (256 U. S. 531, 538). The subsequent reservation for military pur-

poses therefore did not affect the rights of the railroad grantee.

"The grant created a possibility of reversion in the Indians, but inasmuch as it is a matter of public history that the Indian title was extinguished as to the area involved here by treaty of *January* 19, 1889, *with the Creeks and Act of March* 1, 1889 (25 Stat. 757), *we may assume that the right of reversion passed to the United States.*"

* * * * *

"With respect to the 100-foot strip in the right of way under the grant of 1888, as previously stated, a possibility of reversion of title to the United States was created by operation of law. The Department held in E. A. Crandall (43 L. D. 536) that the issuance of patent for land traversed by a right of way granted under the Act of March 3, 1875 (18 Stats. 482), carries no interest in the right of way and upon abandonment or forfeiture thereof, *the legal title reverts to the United States.* This doctrine is affirmed in the cases of *Windsor Reservoir and Canal Company* (51 L. D. 27, 305) A. Otis Birch and M. Estelle Birch. (On Rehearing) (53 L. D. 340)"

* * * *

"It will be observed, however, that the doctrine that entry or patent to the land over which the right of way passes carries no rights in the possibility of reverter, rests upon the principles announced by the Supreme Court, *that land embraced in a valid right of way grant is no longer subject to sale or disposal under the mineral or other public land laws, and therefore the Department is without authority to permit the acquisition of rights by others in such rights of way.*" (Italics supplied).

* * * *

In the light of the above facts and authorities, we

are forced to the conclusion that the decision of the Court in *Churchill* v. *Choctaw Coal & Railway Company*, 4 Okla. 462, 46 Pac. 503, and *U. S. Ex rel. Search* v. *Choctaw Ok. & G. Ry. Co.*, 3 Okla. 404, 41 P. 729, as followed in the opinion of the Supreme Court of the State of Oklahoma in the instant cases correctly state the law; all of which we believe are in accord with *Mackey, County Treasurer* v. *Choctaw, Oklahoma & Gulf R. Co.*, 256 U. S. 531, 65 L. Ed. 1076, decided by this court, and are not subject to successful attack.

CORRECTION OF ERROR IN RESPONDENT'S ORIGINAL BRIEF

In our discussion of the Act of March 8, 1922, 42 Stats. 414, which provides that upon the abandonment of railroad rights-of-way granted by Congress, in Municipalities, the title to such abandoned rights-of-way shall vest in the municipality, we inadvertently stated at the top of pages 54 and 56 of said brief, that the statute provided that it should go to such municipality "for park purposes." In this we were in error, as the Act is silent on the purpose for which the municipality takes the title.

ADDITIONAL REASONS FOR DENYING RELIEF IN HIGGINS CASE

Petitioners at the outset of their Reply Brief have much to say with reference to our position on the non-federal question involved in the Higgins case, predicated on a deed of absolute conveyance made by ancestor Higgins and his wife to the Railway Company. (R. 152) This

deed was pleaded and proven by Petitioners at the trial (R. 176) in the State District Court. While we believe it will serve no useful purpose here to indulge in an extended discussion as to the pleadings in the State Court, yet it is only fair to say that the technical objections raised in the reply brief regarding those pleadings have been made here, for the first time.

Petitioners know, and the Record so shows, that this case was presented and tried in both the District Court and the Supreme Court of the State of Oklahoma upon the theory that there were two main questions involved in the case. First, did R. W. Higgins, the homesteader and ancestor of petitioners, acquire any interest in this strip of land over which the Railroad was constructed, by virtue of his patent? and, second, if he did acquire such interest, did the deed executed by him and his wife, to the Railway Company, convey the absolute fee to the Railway Company?

The Petitioners contended that the Railway Company acquired no rights in the land by the right-of-way Act of Congress and that the patent from the United States to the said R. W. Higgins conveyed the absolute fee simple title to the entire Quarter-section of land including the right-of-way of the Railway Company, and that the deed which was executed by the said Higgins to the Railway Company only conveyed an easement to the Railway Company so long as the Railway Company used and occupied the land for right-of-way purposes.

The respondent contended in both of the State Courts first, that the said R. W. Higgins never took any interest whatsoever in the strip of land over which the railroad was constructed, by virtue of his patent; and that therefore, the railway company did not acquire title to the strip

of land occupied by it by virtue of this deed, but by the Acts of Congress. And second, it was contended that in the event the respondent should be in error as to this, and it should be held that Higgins actually took title by his patent to the strip of land over which the railroad was constructed, then the deed executed by R. W. Higgins and his wife conveyed all the title which they had to the Railway Company; and that the Railway Company in turn by and through the deed executed by it, passed that title on to the respondent, which now owns and occupies the land. No attempt was made in either of the Courts to show that the pleadings did not clearly present these issues upon which the case was tried.

Even if we should not prevail in these cases on the federal question, we do not apprehend that this Court would say anything in its opinion in the Higgins case which would in any wise prejudice or preclude respondent from having its rights fully tried and determined in the State Court upon the non-federal question.

On the face of the record it is clear that the Petitioner in the Higgins case should not prevail upon the State question. This is an ejectment action and a suit to quiet title, and such an action is predicated on petitioners' right to recover in ejectment. It is elementary that a plaintiff in an ejectment suit must recover on the strength of his own title and not on the weakness of that of his adversary's.

McCormack v. *Stonebraker*, 133 Okla. 34, 270 Pac. 1098;
Simmons v. *Jacobs*, 113 Okla. 278, 241 P. 768;
Fairfax v. *Hunter*, 7 Cranch. 603, 3 L. Ed. 453;
Harcourt v. *Gaillard*, 12 Wheat, 523, 6 L. Ed. 716.

In this connection it will be borne in mind that the

petitioners in the Higgins case not only pleaded but introduced in evidence, as we have herein before shown, the deed from their ancestors by which they parted with all right, title and interest in the land involved to the Railway Company; and attention is called to the further fact that under the laws in effect in Oklahoma Territory, at the time of the execution of this deed, railroad companies took absolute fee title by virtue of such deeds.

Marland v. *Gillespie*, 168 Okla. 376, 33 P. (2nd) 207;

Oklahoma City v. *Dobbins*, ___ Okla. ___, 44 Pac. (2nd) 148.

And it will be remembered that the last above cited case was a companion case to the Higgins case and it was decided on the same day that the Supreme Court rendered its decision upon which this appeal is predicated. We discussed the cases last above cited at length in our original brief at pages 9 and 10 thereof.

We submit that upon a consideration of the entire record, and the authorities cited in this and in our original brief, the opinion and judgment of the State Supreme Court should be affirmed in both of these cases.

Respectfully submitted,

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Attorneys for Respondent.

APPENDIX

March 27, 1934.

ABILENE OIL COMPANY

vs.

CHOCTAW, OKLAHOMA AND GULF RAILROAD COMPANY.

G. L. O. 04623.
Guthrie 013958.

Grant to Oklahoma City Held to convey all interest of the United States in the tract described in the grant.

SUBMITTED BY THE GENERAL LAND OFFICE

The Commissioner of the General Land Office has submitted for approval his opinion that the oil and gas deposits underlying that part of the SW¼ Sec. 34, T. 12 N., R. 3 W., I. M., Oklahoma, and within the City of Oklahoma, embraced in certain grants of rights-of-way for railroad purposes to the Choctaw Coal and Railway Company are subject to the operation of the Act of May 21, 1930 (46 Stat. 373), and that a pending application of the Choctaw, Oklahoma and Gulf Railroad Company, the successor in interest to the Choctaw Coal and Railway Company, for a lease under said act may be entertained.

The tract in question consists of a strip of land 300

feet wide, extending from the east to the west boundary of the aforesaid quarter-section.

The Abilene Oil Company, claiming oil and gas rights in the land derived from the City of Oklahoma was permitted by the Department to file objections in the nature of a protest against the application, and response thereto has been made by the applicant company.

The facts relating to the status of title appear to be as follows: By Act of February 18, 1888 (25 Stat. 35), Congress granted a right of way in the Indian Territory to the Choctaw Coal and Railway Company. Map of definite location of the line of road was filed July 8, and approved July 11, 1889. The map showed the right-of-way as traversing the SW¼ Sec. 34 in question, and according to the map filed with the record, having a width in that section of 100 feet. The act of August 24, 1894 (28 Stat. 502), authorized reorganization of the company as the Choctaw, Oklahoma and Gulf Railway Company. Section 2 of the original grant provided that "when any portion thereof shall cease to be used, such portion shall revert to the nation or tribe of Indians from which the same shall be taken." The Chicago, Rock Island & Pacific Railway now operates the right of way as part of its transcontinental line under a lease. By executive order of April 20, 1889, which, it will be observed, was subsequent to the date of the grant, the SW¼ of Sec. 34 was withdrawn from settlement, filing or entry and reserved for military purposes under the control of the War Department. On June 8, 1891, a license was granted by the Acting Secretary of War to the railroad company revocable at will "to enter upon and use for sidings and station purposes land adjoining its right-of-way," through the reservation on either or both sides of the company's

right-of-way, not exceeding in all 200 feet in width and in length extending across the reservation. The company's blue print shows that it took under this license a strip 200 feet wide extending across the reservation adjoining the south boundary of the previously granted right-of-way. On July 26, 1892, the War Department issued a similar license to the railway company to enable it to make advantageous connections with the Atchison, Topeka and Santa Fe Railroad, embracing two tracts of additional land in the reservation of 1.3 and 1.1 acres, respectively. By Executive order of September 28, 1892, the SW¼ of Sec. 34 was transferred to the Interior Department for disposition either under existing law or under subsequent enactments being no longer required for military purposes.

By the Act of August 8, 1894 (28 Stat. 264), the military reservation was granted to Oklahoma City, the scope and effect of which will be hereinafter considered.

The Abilene Oil Company alleges the survey, platting and lotting of the land as required by the grant, the discovery of oil in Oklahoma City in 1928, the present existence therein of approximately 300 wells, the passage of a zoning ordinance limiting and restricting the area in which drilling for oil and/or gas might be done, the inclusion of the area in question in a drilling zone, the claim of the city to the oil and gas rights under the 300-foot strip used as a right-of-way and its division into two permit areas to each of which there has been attached a small area adjacent to the right-of-way, the latter for the purpose of drilling. The Abilene Oil Company claims as assignee of a lease from the city, covering a portion of the 300-foot strip, and a 30-foot strip immediately adjacent thereto on the south. It alleges that permission

is given to drill two wells on the 30-foot strip and that one of such wells is completed and is now producing. A producing well is also alleged to have been completed on the drilling area attached to the permit for the remainder of the 300-foot strip. Copies of the text of City Ordinance 3944 and forms of leases are presented in support of the assertion that further additional wells cannot be permitted without violation of the City Ordinance, and to show that the various owners of parcels of land in any drilling permit area are entitled to participate in royalties from the oil and gas produced therefrom in proportion to their acreage interest. It is argued that if the United States should own the oil and gas rights under the rights of way, its proper course is to assert its rights to the royalties under the present leases, rather than grant an oil and gas lease which would result in prolonged and expensive litigation.

The company advances two propositions:

> "Even if the United States should own the oil and gas rights under the Choctaw, Oklahoma & Gulf Railroad right-of-way, the application for a permit to drill on said right-of-way should be denied because all of said right-of-way is attached to drilling areas and is now sharing in the royalties produced through the wells drilled on said areas as other real property in the drilling zone in Oklahoma City."
>
> "The United States do not own the oil and gas rights under the Choctaw, Oklahoma & Gulf Railroad right-of-way over the property involved."

If the second proposition is sound, it is decisive of the question whether the land is subject to the oil and gas application, and the first need not be considered. The Act of February 18, 1888, granting the right of way 100 feet in width to the Choctaw Coal and Railway Company

was a special grant similar to other special grants of railroad rights-of-way, which have been held to be grants in praesenti, effective at the date of the granting act, so that adverse claims initiated subsequent to the granting act, but prior to the filing of the map of definite location or construction of the road, do not affect the rights of the railroad grantee. See *St. Joseph and Denver City Railroad Company* v. *Baldwin* (103 U. S. 426); *Bybe* v. *Oregon and California Railroad Co.* (139 U. S. 663); *Northern Pacific Railway Company* v. *Ely* (197 U. S. 1). For other Federal cases see 50 *C. J.*, Sec. 427. The Supreme Court of Oklahoma has held the grant under consideration was a grant in praesenti and that title vested in the grantee at the date of the act. *United States* v. *Choctaw, O. & G. Co.* (41 Pac. 729); *Churchill* v. *Choctaw Ry. Co.* (46 Pac. 503).

As to the nature of the estate acquired by the grantee in the right-of-way, the Supreme Court has held, in accordance with its construction of other grants of rights of way under the public land laws for railroad purposes, that the railroad's interest is "neither a mere easement, nor a fee simple absolute, but a limited fee, made on the implied condition of reverter in the event that the company ceases to use or retain the land for the purposes for which it is granted, and carries with it the incidents and remedies attending the fee;" that "in effect, the railroad is the absolute owner of the land." *Choctaw, O. & G. R. R. Co.* v. *Mackey* (256 U. S. 531, 538). The subsequent reservation for military purposes therefore did not affect the rights of the railroad grantee.

The grant created a possibility of reversion in the Indians, but inasmuch as it is a matter of public history that the Indian title was extinguished as to the area in-

volved here by treaty of January 19, 1889, with the Creeks and Act of March 1, 1889 (25 Stat. 757), we may assume that the right of reversion passed to the United States.

The interest of the United States in the SW¼ of Sec. 34 on August 8, 1894, the date of the grant to the City of Oklahoma, was a fee simple absolute in all thereof saving the 100-foot right of way in which it had a mere possibility of a reversion as above defined. The permits issued by the Secretary of War for the use of the adjacent lands by the railroad were not definite or permanent relinquishments of the property, and conferred no right of user after the War Department had lost its right to use the land for military purposes (36 Op. Atty. Gen. 500). The railroad company if so using the land after its transfer to the Interior Department did so by sufferance.

The question is therefore presented to what extent did the grant to the city divest the United States of its interest and estate in the SW¼ Sec. 34. This question will first be considered as to the parcels of land within the permits issued by the Secretary of War, and second, as to the interest of the United States in the right-of-way acquired under the Act of 1888. The question is confined to these areas mentioned for it is not contended, either by the applicant or the Commissioner that an absolute fee simple title did not vest in the city for the remainder of the quarter-section.

The first section of the Act of 1894 reads as follows:

> "*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled.* That the abandoned military reservation at Oklahoma City, in Oklahoma Territory, comprising the southwest quarter of section thirty-

four, township twelve north, of range three west, is hereby granted to said Oklahoma City in trust for the use and benefit of its public free schools, to be used and applied for the benefit of all children of said city of scholastic age without distinction of race, except such portions of said reservation as are reserved for the purposes and uses hereinafter described."

Reading the language in its natural and ordinary meaning, it would seem that the word "except" therein, qualifies and creates an exception from the phrase immediately preceding it, namely, "to be used and applied for the benefit of all children of said city of scholastic age without distinction of race," and not the words "hereby granted." In other words, it was the intend to carve, not out of the grant, but out of the trust for public schools "certain portions of the reservation as are reserved for the purposes and uses hereinafter described." If any doubt arises from the language thus far quoted, as to whether there was any reservation or exception in favor of the United States, it seems clearly dispelled by the description of the reservations in the second section of the act, which reads as follows:

"That not less than ten acres of said reservation shall be set apart and used for said city for the location of public buildings and for a public park. That within ninety days after the passage of this Act the Southern Kansas Railway Company shall have the right to purchase from said city, adjoining said company's present right of way, for depot grounds and other railroad purposes, not to exceed six acres of said reservation, the value thereof and the price to be paid therefor to be fixed by the appraisers to be appointed by the Secretary of the Interior within said ninety days. That the permits

heretofore granted to the Choctaw Coal and Railroad Company by the Secretary of War for lands across and upon said reservation, shall remain in force until such time as the land so granted shall cease to be used for railroad purposes, when the same shall pass to the city."

In this section there is no room for the construction that a reservation or a reversion in title was made in favor of the grantor.

There are three reservations, namely: (1) not less than ten acres for public buildings and a public park. This plainly is not a reservation of title, but a reservation from the benefit of the trust for the use of public schools. (2) The Southern Kansas Railway Company is given the right to purchase not to exceed six acres adjacent to its right of way *"from said city."* This also is plainly no reservation of title, but a right in the railroad to obtain title from the grantee. (3) "The permits heretofore granted * * * the Secretary of War * * * shall remain in force, until the land so granted (under permits) shall cease to be used for railroad purposes, *when the same shall pass to the city."* (Emphasis supplied.)

Considering the precarious tenure under which the railroad held possession of the permit areas at the time of the grant to the city, it does not seem that the last reservation had any other purpose than as expressed in the act to provide that the permits should remain in force, conditioned upon the continuous use of the land for railroad purposes. It was to protect the railroad from ouster by the city. There is nothing incompatible with the grant of title in fee to the city, as expressed in the first section, with the reservation of such posses-

sory right in favor of the railroad company. While the words "when the same" (meaning the land) shall pass to the city, if taken alone might import a retention of fee in the grantor, yet when the entire intent is gathered from the four corners of the statute, it seems plain that what is meant is, that the use and possession should pass to the city upon the cessation of use for railroad purposes. It might be argued that by changing the tenure of the permit and adding the attributes of perpetuity and exclusiveness to the railroad's estate, thereby a limited or base fee was vested in the railroad company similar to like grants under general public land laws. Assuming that were true, it does not help the position of the applicant company. The words creating an estate over in the city in the nature of conditional limitation destroyed any possibility of the United States having the fee again. There was, therefore, no interest left in the United States, subject to grant under the Act of May 21, 1930, *supra*, in the permit areas.

With respect to the 100-foot strip in the right-of-way under the grant of 1888, as previously stated, a possibility of reversion of title to the United States was created by operation of law. The Department held in *E. A. Crandall* (43 L. D. 536) that the issuance of patent for land traversed by a right-of-way granted under the Act of March 3, 1875 (18 Stat. 482), carries no interest in the right-of-way and upon abandonment or forfeiture thereof, the legal title reverts to the United States. This doctrine is affirmed in the cases of *Windsor Reservoir and Canal Company* (51 L. D. 27, 305). *A. Otis Birch and M. Estelle Birch* (On Rehearing) (53 L. D. 340).

In the last case cited, the right to require competitive bids between a railroad applicant for lease under the

Act of May 21, 1930, *supra,* and abutting owners respecting the royalties they would agree to pay for the extraction of oil and gas under a railroad right of way was upheld, as against the claim of a patentee of adjacent land, under the mining law.

Reviewing the previous decisions of the courts and the Department, it was there held, that the prior right of way was as much eliminated from the mineral patent as it would have been if excepted therein by description; that the owner of the right-of-way had no right to the minerals therein by virtue of its grant, and that the land in the right of way was not subject to mining location, though mineral land: That the acts of February 25, 1909 (35 Stat. 647), and March 8, 1922 (42 Stat. 414), purporting to vest title in the holders of the land traversed by the right-of-way in the event of forfeiture or abandonment thereof,—the last named act reserving all minerals to the United States,—were predicated on the assumption that upon extinguishment of the right-of-way, the United States resumed full title, that the act of May 21, 1930, was an extension of the rights of the railroad grantee by granting him mining rights.

It will be observed, however, that the doctrine that entry or patent to the land over which the right-of-way passes carries no rights in the possibility of reverter, rests upon the principles announced by the Supreme Court, that land embraced in a valid right of way grant is no longer subject to sale or disposal under the mineral or other public land laws, and therefore the Department is without authority to permit the acquisition of rights by others in such rights of way. It does not follow from this, as the Commissioner concedes, that if any interest contingent or expectant continues in the United States,

Congress may not dispose of it. In fact it has exercised such authority by providing in the acts last above cited that upon abandonment or forfeiture of the grant the title shall inure to the holders of the land traversed by the right of way. The Commissioner is of the opinion that if the possibility of reverter in the right-of-way was intended to be granted, express mention of it would have been made of it in the grant. He applies the rule that legislative grants should be construed in favor of the public, and whatever is not granted in clear and explicit language is withheld. But the grant here in question purported to convey the entire SW¼, and was broad enough to comprehend any interest the United States had in the land. The test should rather be whether the deed of grant manifested any intention to exclude the possibility of reverter in the right of-way. *Roxana Petroleum Corporation* v. *Sutter et al.* (28 Fed. (2d) 159, 162). It is not irrelevant to consider that at the time this grant was made there was no knowledge or well-grounded belief that the land was valuable for oil, and a reversion of title was doubtless regarded as remote, if not improbable. The intention of Congress is not to be gauged by subsequent events. So far as the grant purported to convey the title and estate of the railroad grantee, it was without effect. The city took the land subject to the right of way. *Stalker* v. *Oregon Short Line Railroad Company* (225 U. S. 142); *Rio Grande Western Railway* v. *Stringham* (239 U. S. 44). But this result arises by operation of law and not by the terms of the grant. In the latter there is not a word or phrase which could be used as a basis for the contention that the United States excepted any land or reserved any rights in itself. It is the judgment of the Department that

the grant to the city divested the United States of all the interest it had in the land. The rule of construction invoked by the Commissioner does not justify the withholding of that which satisfactorily appears to have been conveyed in the grant. *Russell* v. *Sebastian* (233 U. S. 195). It follows that the Act of May 21, 1930, *supra,* has no application, and the application of the Choctaw, Oklahoma and Gulf Railroad Company should be denied.

(Sgd.) T. A. WALTERS,

First Assistant Secretary.

SUPREME COURT OF THE UNITED STATES.

Nos. 335 and 336.—October Term, 1935.

335	George Noble, et al., Petitioners, *vs.* City of Oklahoma City.	On Writs of Certiorari to the Supreme Court of the State of Oklahoma.
336	Robert W. Higgins, et al., Petitioners, *vs.* City of Oklahoma City.	

[March 2, 1936.]

Mr. Justice Roberts delivered the opinion of the Court.

These were actions in ejectment tried in a state court. The petitioners in No. 335 sued as the heirs of Naoma Noble, the petitioners in No. 336 as the heirs of Robert W. Higgins. Title to a town lot and a portion of another parcel of land located in the respondent city was in dispute.

The tracts formerly were part of the tribal lands of the Creek Indians. Pursuant to treaties the Creeks removed from east of the Mississippi River to a large area in Indian Territory, now in the State of Oklahoma,[1] and a patent was issued by the President of the United States, granting them the lands "to have and to hold . . . . so long as they shall exist as a Nation and continue to occupy the Country hereby conveyed to them."[2] By the Treaty of Washington[3] the tribe ceded to the United States the western half of their domain, which included the site of what is now Oklahoma City, in trust, to be sold and used as homes for civilized Indians whom the United States might desire to settle thereon. This and a prior treaty vested in Congress power to grant railroad rights-of-way through the Creek country. The United States did not sell any portion of the ceded area to Indians or permit white settlement in the region of Oklahoma City and the land remained vacant.

By Act of February 18, 1888,[4] Congress authorized the Choctaw Coal and Railway Company to locate and construct a railroad

[1] 7 Stat. 366; 7 Stat. 417; 11 Stat. 699.
[2] Vol. 4 of Indian Deeds, in the Office of Indian Affairs, pp. 446-447.
[3] June 14, 1866, 14 Stat. 785.
[4] 25 Stat. 35.

traversing the southeastern portion of the Indian Territory, through lands of the Choctaw Nation whose title was similar to that of the Creek Nation.[5]

The President, on January 19, 1889, negotiated a treaty with the Creeks[6] by which they ceded to the United States full and complete title to the entire western half of their lands, thus freeing the area from the trust under which it had theretofore been held. This treaty was subject to ratification by the council of the Tribe and by Congress. It was confirmed by the former January 31, 1889.

Pending the ratification of the treaty, Congress, on February 13, 1889, amended the Act of February 18, 1888, to authorize the railway company to construct a branch extending from its main line northwestwardly through Choctaw and Creek country.[7] The road so authorized now traverses Oklahoma City. The Creek Tribe then owned the eastern portion of the Creek country through which the branch line was to run, and retained an interest in the western portion. March 1, 1889, Congress ratified the treaty of January 19, 1889, and, in the act of ratification, provided that "the lands acquired by the United States under said agreement shall be a part of the public domain."[8]

By Act of March 2, 1889,[9] Congress directed that the lands acquired from the Creek Nation should be disposed of to actual settlers under the homestead laws but that no person should be permitted to enter thereon until the territory was opened for settlement. The release, conveyance, and extinguishment of the Indians' rights was not to inure "to the benefit of or cause to vest in any railroad company any right, title, or interest whatever in or to any of said lands . . . and all grants or pretended grants of said lands or any interest or right therein now existing in or on behalf of any railroad company, except rights of way and depot grounds," were declared forfeited for breach of condition.

March 23, 1889, the President issued a proclamation opening a portion of the lands to settlement at noon April 22, 1889. Before the latter date the railway company had surveyed the line of its

[5] See Treaty of June 22, 1855, 11 Stat. 611.
[6] 25 Stat. 757.
[7] 25 Stat. 668.
[8] 25 Stat. 757.
[9] 25 Stat. 980, 1004-1005.

proposed railroad through what is now Oklahoma City and marked it by stakes along the centre line of the right-of-way and by signs warning that the land was claimed for right-of-way and station purposes. It appears to have been then known that a town site would be laid out on the quarter-section in which the Noble tract is located. Prior to the opening of the land a plat had been made and, at 12 o'clock, April 22, 1889, surveyors began to run lines and drive stakes to locate the lots and blocks of the town site. On that day many settlers, amongst whom was Naoma Noble, arrived and staked and occupied lots. As the survey proceeded they adjusted their claims and boundaries to the survey lines. In surveying and staking out lots both the surveyors and the ancestor of the petitioners in No. 335 disregarded the right-of-way marks. All the lots in the original town site, comprising the quarter-section in which the Noble land is situated, were occupied on the day of opening. On the same day Robert C. Higgins, the ancestor through whom the petitioners in No. 336 claim, settled upon the quarter-section adjoining the town site on the west, and undertook to file a homestead entry thereon.

July 13, 1889, the railway company filed with the Secretary of the Interior a map of definite location of its line as staked out through Oklahoma City. The road ran diagonally through the town site quarter-section, included the whole of the Noble lot, and traversed diagonally Higgins' adjoining quarter-section.

The Act of May 2, 1890,[10] organizing the Territory of Oklahoma, provided that "No part of the land embraced within the Territory hereby created shall inure to the use or benefit of any railroad corporation, except the rights of way and land for stations heretofore granted to certain railroad corporations. Nor shall any provisions of this act or any act of any officer of the United States, done or performed under the provisions of this act or otherwise, invest any corporation owning or operating any railroad in the Indian Territory, or Territory created by this act, with any land or right to any land in either of said Territories, and this act shall not apply to or affect any land which, upon any condition on becoming a part of the public domain, would inure to the benefit of, or become the property of, any railroad corporation." Not until

[10] 26 Stat. 81, 91.

May 14, 1890,[11] did Congress pass a town site act applicable to Oklahoma. In the meantime, the citizens had established a form of government and elected officials. A plan of the town site was filed in the office of the City Recorder and provision made by ordinance for recording transfers of the plotted property. The Recorder issued certificates to the occupants of lots and transfers were made by quit-claim deeds. After the passage of the town site act trustees were appointed and the entire quarter-section constituting the original town site was patented to the trustees without exception, limitation, or reservation. In due time the trustees issued their deeds for the various lots, including the Noble tract.

From 1889 to 1893 the railway company and the lot claimants were in disagreement, the former contending that the acts of Congress vested it with title to the right-of-way, the latter insisting that their occupation before the filing of the company's plot with the Secretary of the Interior gave them the superior title. The dispute was amicably settled by the company's relinquishing its claim to the diagonal three hundred foot right-of-way as plotted, and relocating it, one hundred feet wide, parallel to the streets and alleys shown on the city plan. The lots or portions of lots required for the relocation were obtained from the owners by deeds or condemnation. March 28, 1891 Naoma and George Noble executed a deed to the railway company containing the following clause:

"Being intended for the use and occupation of said party [grantee], its successors and assigns, as and for its right-of-way for the constructing, operation and maintenance of its railroad and business at or upon the land hereby released and quit claimed: Provided, that in case of abandonment of said premises by said second party, its successors or assigns for the purposes above mentioned, the same shall revert to the grantors, their heirs or assigns."

The right of Higgins to make a homestead entry being involved in a land office contest the company constructed its road across his quarter-section and was operating trains thereover in 1892. After the contest eventuated in his favor he conveyed to the railroad, in 1898, for a pecuniary consideration, a strip of land one hundred feet wide across his quarter-section "for a right of way for its railroad, Telegraph and Telephone Lines, and for Railroad or Station purposes." The habendum clause was:

"To have and to hold the same by the said Choctaw Oklahoma and Gulf Railroad Company, together with all and singular the

[11] 26 Stat. 109.

rights, privileges and appurtenances thereunto belonging and all the rights and privileges which said company is authorized to have, hold and exercise under and by virtue of the Act of Congress granting the Choctaw Coal and Railway Company a right of way through the Indian Territory, approved February 18th, 1888, and subsequent Acts of Congress amending and extending said Act together with all the rights and privileges granted unto said Choctaw, Oklahoma and Gulf Railroad Company by an Act of Congress approved August 24th, 1894, and the Act of Congress approved April 24th, 1896, and unto its successors, and assigns forever."

The road constructed on the right-of-way so acquired in Oklahoma City was operated by the railway and its successors until December 4, 1930. Pursuant to an agreement made with the city, the then owner and operator secured the approval of the Interstate Commerce Commission of the abandonment of the line,[12] and executed a quit-claim deed to the city for the abandoned portion. A decree was obtained from the United States District Court for the Western District of Oklahoma adjudging that the land had been abandoned for railroad purposes and that the company's title had passed to the city under an Act of Congress of March 8, 1922.[13] None of the petitioners was a party to this proceeding. The city took possession and has since held the strip. These suits were filed shortly thereafter. Petitioners asserted that the Act of February 18, 1888, and the amending Act of February 13, 1889, made no grant *in praesenti* of a right-of-way but merely authorized the company

[12] The railway was reorganized as Choctaw, Oklahoma and Gulf Railroad Company and the reorganized company given the same rights as its predecessor. 28 Stat. 502; 29 Stat. 98. At the time of the abandonment the Chicago, Rock Island and Pacific Railroad Company was operating the line in question under a lease for 999 years.

[13] 42 Stat. 414, 43 U. S. C., § 912: "Whenever public lands of the United States have been or may be granted to any railroad company for use as a right of way for its railroad or as sites for railroad structures of any kind, and use and occupancy of said lands for such purposes has ceased or shall hereafter cease, whether by forfeiture or by abandonment by said railroad company declared or decreed by a court of competent jurisdiction or by Act of Congress, then and thereupon all right, title, interest, and estate of the United States in said lands shall, except such part thereof as may be embraced in a public highway legally established within one year after the date of said decree or forfeiture or abandonment be transferred to and vested in any person, firm, or corporation, assigns, or successors in title and interest to whom or to which title of the United States may have been or may be granted, conveying or purporting to convey the whole of the legal subdivision or subdivisions traversed or occupied by such railroad or railroad structures of any kind as aforesaid, except lands within a municipality the title to which, upon forfeiture or abandonment, as herein provided, shall vest in such municipality, and this by virtue of the patent thereto and without the necessity of any other or further conveyance or assurance of any kind or nature whatsoever: . . ."

to acquire one by purchase or condemnation; that these statutes applied only to Indian country and not to the public domain; and that on February 13, 1889, the land in question was Creek Indian land and the only title the company acquired to its right-of-way, so far as the tracts in controversy are concerned, was that conveyed by the deeds of petitioners' ancestors under both of which the title, on abandonment for railroad purposes, reverted to their heirs and assigns. The defense to this claim was that the acts presently invested the railway with title to the right-of-way subsequently located, obtained and used, which, upon abandonment of the use, reverted to the United States and was, by the Act of March 8, 1922, conveyed to the respondent.

Petitioners further urged that, even if the acts of Congress operated as grants *in praesenti*, the estate of the company endured only so long as the land was devoted to railroad use, with a right of reverter, either vested in the Creek Tribe and conveyed to the United States by the cession effective March 1, 1889, or vested directly in the United States; and the right of reverter passed from the United States by patent to the petitioners' ancestors and from them, by deed and inheritance, to the respective petitioners. Upon the extinguishment of the railroad's estate by abandonment, full title, so they claimed, reverted to them. They alleged the Act of March 8, 1922, does not apply in the circumstances and, if held applicable, is unconstitutional as depriving them of property without due process.

The trial court entered judgments in favor of the city and, on appeal, the Supreme Court of Oklahoma consolidated the cases for hearing and affirmed the judgments.[14] In their applications for certiorari the petitioners asserted that the state court's construction of the acts of 1888 and 1889 conflicts with the decision of a federal court in respect of an act identical in terms,[15] and stressed the importance of a final adjudication as affecting not only their titles but many others in Oklahoma City, the subject of threatened suits in state and federal courts. On this showing the writ was granted.

First. The Act of February 18, 1888, does not purport to grant lands for right-of-way and station purposes. The title is "An act

[14] — — Okla. — —; 44 P. (2d) 135.

[15] *United States* v. *Fort Smith and Western Railroad Company*, 195 Fed. 211, 214.

to authorize the Choctaw Coal and Railway Company to construct and operate a railway through the Indian Territory". By the first section the company is "invested and empowered with the right of locating, constructing, owning, equipping, operating, using, and maintaining a railway." Section 2 provides that the corporation "is authorized to take and use" for railway, but for no other purpose, a right-of-way and "to take and use" land for station purposes. Section 3 requires that, before the road shall be constructed through land held by any individual occupant according to Indian usage, full compensation must be made to the occupant, prescribes the method of securing compensation, and creates a tribunal for ascertaining and awarding it, from whose decision a right of appeal to a federal court is given. Section 5 lays on the company the obligation to pay to any tribe through whose unallotted lands the line may run a fixed compensation per mile. If the tribe be dissatisfied with the amount specified in the act the just measure of compensation is to be ascertained by the same procedure as is directed in the case of an individual allottee. The company is permitted to survey and locate its railway immediately; and, by Section 6, is required to cause maps, showing the location of its lines, to be filed with the Secretary of the Interior and with the chiefs of the nations or tribes through whose lands they run. The section adds: "After the filing of said maps no claim for a subsequent settlement and improvement upon the right of way shown by said maps shall be valid as against said company". The Secretary of the Interior is to approve of the location before any construction may be begun. Section 13 enacts: "The right of way herein and hereby granted shall not be assigned or transferred in any form whatever prior to the construction and completion of the road, . . . ". Except for the words just quoted from Section 13 upon which respondent relies the act plainly grants an authority or a franchise rather than physical property. The expression used in that section is not sufficient to enlarge the limited scope of the act disclosed by the enacting sections.

The respondent, and the court below, refer to decisions holding certain right-of-way acts to be grants *in praesenti*, but those acts not only affect the public lands of the United States which are

subject to unrestricted disposition by the Government,[16] but explicitly state that "a right of way is hereby granted."[17]

The act of 1888, considered in its entirety, evinces the intent that the company is to compensate for all lands taken for its use, whether those of individual allottees or of the tribe. No provision for compensation to white settlers was made because at the date of the passage of the statutes none were permitted within the area to be traversed by the railroad. The acts in question were construed by Assistant Attorney General (now Mr. Justice) Van Devanter in an opinion rendered to the Department of the Interior in 1898,[18] as not making grants *in praesenti,* but conferring only the right to locate a railroad and take the necessary land upon making just compensation to its owners or those having an inchoate right of ownership. A similar conclusion was announced by the Circuit Court of Appeals for the Eighth Circuit[19] in respect of the act authorizing the building of the Fort Smith and Western Railroad,[20] which is identical with that under review except for the name of the company and the termini of the projected railroad.

Later statutes respecting the railroad are said to support respondent's view of the nature of the original grant. We think, however, the subsequent legislation is, at best, of doubtful aid in the construction of the act of 1888. The Act of February 13, 1889, amended Section 1 of the original act by authorizing the construction of the branch line extending westwardly and northwestwardly from the main line, which branch now runs through the respondent city. It made no other alteration in the provisions of the earlier legislation. The Acts of February 21, 1891,[21] and January 22, 1894,[22] extended the time originally granted for constructing the railroad. The latter act added: "And for such purpose the said company shall have the right to take and occupy the right of way and depot grounds heretofore granted to it by said acts." We

[16] *Ruddy* v. *Rossi,* 248 U. S. 104, 106.

[17] See, e. g., *Missouri, K. & T. R. Co.* v. *Kansas P. Ry. Co.,* 97 U. S. 491; *Railroad Co.* v. *Baldwin,* 103 U. S. 426; *United States* v. *Southern Pacific Railroad,* 146 U. S. 570; *Northern Pac. Ry. Co.* v. *Townsend,* 190 U. S. 267; *United States* v. *Michigan,* 190 U. S. 379. The general railroad act of 1875 (18 Stat. 482) also grants a right-of-way *in praesenti: Jamestown and Northern R. R. Co.* v. *Jones,* 177 U. S. 125; *Stalker* v. *Oregon S. L. R. Co.,* 225 U. S. 142.

[18] 27 Land Office Decisions, 414.

[19] *United States* v. *Ft. Smith & Western R. Co.,* 195 Fed. 211, 214.

[20] 30 Stat. 1368.

[21] 26 Stat. 765.

[22] 28 Stat. 27.

think, in the light of the clear provisions of the original authorization, no inference favorable to the respondent's contention is to be drawn from this phrase in the extending act.

On the other hand, Congress has indicated its view that the original act merely authorized the exercise of the right of eminent domain. By the Act of August 24, 1894,[23] the creditors and stockholders of the railway, which had become insolvent, were reorganized into a new corporation, the Choctaw, Oklahoma and Gulf Railroad Company. Section 4 provides: "That it shall and may be lawful for such new corporation to construct and operate branches from its said railroad and for such purpose to take and use rights of way . . . . upon making compensation therefor as provided in the case of taking land for its main line . . . ".

Respondent also cites a portion of Section 18 of the Organic Act for the Territory of Oklahoma quoted *supra* to support the claim that by the Act of 1888 Congress intended to grant *in praesenti*. For the same purpose the court below quoted and relied on one sentence found in the section. We think, however, that the provision was merely intended to preserve the *status quo* and does not aid in the construction of previous legislation respecting the rights of railroads in the Territory.

Were the Act of 1888 of doubtful import the conditions existing when it and the amending act of 1889 were adopted would be conclusive of the legislative intent. The main line authorized by the first act ran for the greater portion through the lands of the Choctaw and Chickasaw Indians. The title of these tribes was substantially similar to that of the Creeks and while, in the treaty by which their title was confirmed, there was provision that rights of way for railroads might be granted through their territory, the condition was added that full compensation should be made for any property taken or destroyed in the construction of any such road. The branch line authorized by the Act of 1889 extended westward through the eastern portion of the Creek lands which was unaffected by the treaty of 1866. The treaty of 1856 with this tribe contained a provision similar to that found in the Choctaw Treaty securing compensation for lands taken for railroad rights of way. The branch line also was to traverse the western portion of the Creek Nation's territory but,

[23] 28 Stat. 502. And see Sec. 2 of the Act of April 24, 1896, 29 Stat. 98; Sec. 2 of the Act of March 28, 1900, 31 Stat. 52.

at the time the branch was authorized (February 13, 1889), that area was not public land of the United States and was held in trust for the settlement of other Indians. The restriction was not removed until March 1, 1889, at which time these lands were declared to be part of the public domain and intended for white settlement.

Both the original and the amending act contemplated that the right-of-way would run through lands owned by Indian tribes or claimed by Indian allottees and none other. In view of the nature of the title of the Indians, we cannot impute to the Congress a purpose by the Act of 1888 to grant any portion of the lands to the company or to impose a servitude without compensation.

For these reasons we are unable to agree with the construction of the act by the Supreme Court of Oklahoma in the present case and in earlier decisions.[24] We hold the legislation granted a franchise, authorized a taking upon compensation secured or made, and was not a grant of land.

Second. Assuming, for the sake of argument, that the act of 1888 granted the railroad a base or limited fee, as does the general railroad act of March 3, 1875,[25] we think the marked similarity of this special act to the general statute requires that they be given the same construction. It is well settled that the title to right-of-way and station lands conferred by the general railroad act does not accrue to the company until a map of definite location is filed with the Secretary of the Interior for his approval, or the road is actually constructed, and the rights of one claiming by settlement or occupancy antedating such filing or construction, are superior to those of the railroad.[26] Like the general railroad law, the act in question required the filing of plats of the location of the line for the Secretary's approval and, in addition, expressly subordinated to the railroad's rights any claim based on a settlement subsequent to such filing. This was a clear recognition of the principle applied to rights-of-way acquired pursuant to the general law, which was that the staking of a location of the proposed line was ineffectual to prevent the acquirement of rights by

[24] *United States* v. *Choctaw O. & G. Ry. Co.*, 3 Okla. 404, 41 Pac. 729; *Churchill* v. *The Choctaw Ry. Co.*, 4 Okla. 462, 46 Pac. 503.

[25] C. 152, 18 Stat. 482; 43 U. S. C., Secs. 934-939. See *Rio Grande Western Ry. Co.* v. *Stringham*, 239 U. S. 44, 47, and cases cited.

[26] *Minneapolis, etc. Ry. Co.* v. *Doughty*, 208 U. S. 251; *Great Northern Railway Co.* v. *Steinke*, 261 U. S. 119.

settlers and occupants under the homestead and town site laws.[27] It is not to be supposed that a different rule was intended by the Act of 1888. The petitioners entered upon their tracts April 22, 1889. The company's map was not filed with the Secretary of the Interior until July 13th of the same year. Whatever the quality of the statutory grant to the railroad company, its rights had their inception after the assertion of, and were inferior to, those of the petitioners' ancestors.

Third. It follows from what has been said that the railroad derived title to the Noble lot by the deed of Naoma and George Noble of March 28, 1891. As no question is made but that the reverter clause in that deed became operative upon abandonment of the line, the Noble title is superior to that of the respondent. It is equally true that when Higgins made his deed to the railroad company in 1898 he had good title to the premises conveyed and by that conveyance the railroad obtained whatever estate it had. The petitioners insist that the habendum clause in the deed operated to clothe them with full title on abandonment of the right of way. They say that the Supreme Court of Oklahoma so held. The opinion seems to proceed on this assumption, but in the view the court took, a decision of the question was unnecessary, and we find no direct ruling upon the point. We express no opinion as to the effect of the habendum clause, since this is a question of state law and appropriately may be decided by the state court.

The grounds stated for our decision make it unnecessary to consider or to decide the other questions raised by the petitioners. The judgment of the Supreme Court of Oklahoma must be reversed and the causes remanded to that Court for further proceedings not inconsistent with this opinion.

So ordered.

A true copy.

Test:

Clerk, Supreme Court, U. S.

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[27] *Ibid.*